In the Supreme Court of the United States.

No. 197.

THE CLEVELAND ELECTRIC RAILWAY COMPANY,

APPELLANT,

vs.

THE CITY OF CLEVELAND AND THE FOREST CITY RAILWAY COMPANY,

APPELLEES,

AND

No. 321.

THE CITY OF CLEVELAND AND THE FOREST CITY RAILWAY COMPANY,

APPELLANTS,

vs.

THE CLEVELAND ELECTRIC RAILWAY COMPANY,

APPELLEE.

Brief for the City of Cleveland as Appellee in Case No. 197 and as Appellant in Case No. 321.

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City Solicitor.

Press of
The Gates Legal Publishing Co.,
Cleveland, Ohio.

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Brief for the City of Cleveland as Appellee in Case No. 197 and as Appellant in Case No. 321.

The cross appeals here presented raise two questions and grow out of the same cause. In case No. 197, in which The Cleveland Electric Railway Company is appellant, it is sought to reverse a judgment and decree of the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, adjudging that the rights and franchises of The Cleveland Electric Railway Company to maintain and operate a street railroad in Central Avenue and Quincy and Erie Streets expired on the 22nd day of March, 1905.

In Case No. 321 The Forest City Railway Company, with which The City of Cleveland joins, appeals to this Court to reverse a decree adjudging void an ordinance of the City of Cleveland passed on the 11th day of January, 1904, entitled:

> "An ordinance granting to The Forest City Railway Company, its successors and assigns, the renewal right to maintain and operate the existing street railroads in the following streets,"

the streets referred to being those upon which the right of The Cleveland Electric Railway Company to maintain and operate a street railroad have been adjudged to have expired.

The questions thus presented are:

1. DID THE RIGHTS OF THE CLEVELAND ELECTRIC RAILWAY COMPANY TO MAINTAIN AND OPERATE A STREET RAILROAD IN CENTRAL AVENUE AND QUINCY AND ERIE STREETS EXPIRE ON THE 22ND DAY OF MARCH, 1905?

2. IS THE ORDINANCE OF THE CITY OF CLEVELAND, WHICH ATTEMPTS TO EMPOWER THE FOREST CITY RAILWAY COMPANY TO TAKE OVER AND CONTINUE THE OPERATION OF THE RAILROAD PREVIOUSLY OPERATED ON CENTRAL AVENUE AND QUINCY AND ERIE STREETS INVALID?

The questions thus presented arose as follows:

On the 21st day of March, 1905, The Cleveland Electric Railway Company filed in the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, its bill in equity, asserting itself to be a corporation organized and existing under the laws of the State of Ohio, owning and operating various lines of street railway in the City of Cleveland and vicinity, and setting up in historical sequence, the various steps by which the complainant became a consolidated company and came into possession of various lines of street railroad in the City of Cleveland. It asserted that by reason of the facts averred in the bill its right to operate the street rail-

road in question had been, from the time of its original creation, renewed to the 1st day of July, 1914, and that the ordinance of the City of Cleveland, passed on the 11th day of January, 1904, attempting to grant to The Forest City Railway Company the renewal right to maintain and operate the street railroad, theretofore operated by the complainant, was a law of the State of Ohio, impairing the obligation of a contract in violation of the Constitution of the United States and therefore void, upon which averments an order of injunction was prayed against the City of Cleveland, its officers, and The Forest City Railway Company and its officers, prohibiting and restraining them from putting ordinance No. 42240, being the ordinance making the grant to The Forest City Railway Company, into effect and further enjoining all such persons from proceeding in any suit or action, or otherwise to compel the complainant to cease the operation of the line of railroad in dispute until the said 1st day of July, 1914, to which time the complainant asserted its right to continue.

On the 23rd day of March, 1905, a temporary restraining order was allowed upon the verified bill of complaint and upon the motion of the complainant, and a rule was issued against the defendants to appear on the 8th day of April, 1905, to show cause why the complainant's motion for a temporary injunction should not be granted. Both defendants filed answers to the bill of complaint (Record, pages 32 and 48), making various admissions and denials, and on the 8th day of April, the day set for the return of the rule to show cause, the complainant filed an amendment to its bill (Record, page 63), averring, in addition to the allegations contained in the original bill, that as to a portion of the lines of street railway operated by the complainant, a perpetual right to operate existed and that such perpetual right existed as to a portion of the lines covered by this controversy. Upon this state of the pleadings the amendment to the bill having been filed on the return day of the rule, the case was argued, and on the 24th

day of April, 1905, the Hon. R. W. Taylor, Judge, handed down an opinion (Record, pages 65 to 87) directing that a decree, denying the temporary injunction, be framed as if upon final hearing for the grounds stated in the opinion of the Court. A motion was made for a decree, in accordance with the Court's opinion on the 27th day of May, 1905, there having been previously filed amendments to the answers of the City of Cleveland and The Forest City Railway Company, covering the averments of the amendment to the bill of complaint (Record, pages 89 and 93). Further formal motions and proceedings were had until the 3rd day of October, 1905, when on application of the complainant by its solicitor, leave was given to file an amended bill and such a bill was filed (Record, page 107). This bill incorporates not only the averments contained in the amendment to the original bill filed at the time of the hearing on the motion for a temporary injunction but makes an additional attack upon Ordinance No. 42240, in that it attempted to take property of the complainant in the streets in question without due process of law and was therefore upon that ground invalid. Answers were filed to the amended bill of complaint, (Record, pages 137 and 159) and upon the issues so presented a final decree was passed, in accordance with the opinion of the Court, upon the hearing for a temporary injunction, so far as the date of the expiration of the complainant's rights was concerned but sustaining the contention of the complainant as to the invalidity of Ordinance No. 42240, on the ground that it did seek to take property without due process of law and was therefore invalid. From the former of these rulings The Cleveland Electric Railway Company appealed, to the latter, The Forest City Railway Company, the City of Cleveland joining, filed its cross appeal.

An inspection of this record will show that the rights sought to be established by The Cleveland Electric Railway Company are to be derived, if at all, from a mass of ordi-

nances of the City of Cleveland covering a period of about thirty years. To comprehend the exact effect of these various enactments, a historical statement arranging them in chronological order is necessary.

HISTORICAL STATEMENT.

The City of Cleveland is, and at all times mentioned in the pleadings in this case was a municipal corporation of the State of Ohio, situated in Cuyahoga County. Immediately adjacent to it on the east was and still is the Village of East Cleveland. In 1868, the dividing line between these two municipal corporations was known as Willson Avenue By various proceedings authorized by the statutes of Ohio, the municipal boundaries of Cleveland were from time to time enlarged, territory previously within the limits of the Village of East Cleveland becoming part of the City of Cleveland. In 1859 The East Cleveland Railroad Company was incorporated under authority of the incorporation law then existing in the State of Ohio, known as the act of May 1, 1852, and on November 1, 1859, July 3, 1860, and April 15, 1862, The East Cleveland Railroad Company received the consent and permission of the City of Cleveland for the operation of a line of railway beginning at the easterly limits of the city—Willson Avenue—and running thence via Euclid Avenue, Case Avenue, Prospect Street, Erie Street, Euclid Avenue, to and around the southerly and westerly sides of the Public Square to Superior Street; thence through Superior Street to Water Street. The consent of the City of Cleveland in these various instances was for the period of twenty years from the 20th day of September, 1859. This line was the original street railroad of The East Cleveland Railroad Company. (Record, pages 110, 161 and 182, 183, 184, 185 and 186.)

YEAR 1862.

On the 9th day of August, 1862, the trustees of East Cleveland Township pased a resolution and also an ordinance granting permission to The East Cleveland Railroad Company to construct and operate a street railroad in Euclid Avenue easterly from the intersection of Willson Avenue to Doan's Corners. The territory covered by this grant became a part of the City of Cleveland by annexation in the year 1872. The action of the trustees of East Cleveland Township was taken pursuant to an application by The East Cleveland Railroad Company, requesting that the right be granted as an extension of the tracks previously constructed, as hereinbefore shown. (Record, pages 111, 140, 187.)

YEAR 1868.

On the 14th day of January, 1868, the Council of the City of Cleveland passed a resolution (Record, pages 111, 141, 188) granting the consent of the council to The East Cleveland Street Railroad Company to enter upon and to lay down a track, with the necessary switches and turnouts, from the intersection of Prospect and Brownell Streets, there connecting with the street railroad already constructed by The East Cleveland Railroad Company, and running thence along the center of Brownell Street to its intersection with Garden Street; thence easterly along Garden Street to and across Willson Avenue to the easterly boundary of the City of Cleveland. (Record, pages 111, 141, 188.) By the terms of this resolution it is shown that the right granted by it to The East Cleveland Railroad Company *was an original grant, and not what subsequently came to be authorized by the statutes of Ohio, known as an extension.* The resolution (Record, page 188) recites that application for leave to construct a street railroad over the route described had previously been made by The East Cleveland Railroad Company to the City of Cleveland; that the consents of the owners of property abut-

ting upon the said streets had been duly filed with the city clerk; that the requisite notice for bids had been given, bids received and that The East Cleveland Railroad Company was the lowest bidder thereon. The resolution further limits the right therein granted to the period of twenty years from and after January 14, 1868.

This was the beginning of the so-called Garden Street line and upon the acceptance of the terms of the resolution on the 16th day of January, 1868 (Record, page 188), the situation was that the East Cleveland Railroad Company had two lines of railroad—its Euclid Avenue line inaugurated as we have shown, and its Garden Street line, which is the subject matter of this controversy, both resulting from original grants having no common operation, one limited to expire in twenty years from the 20th day of September, 1859, and the other limited to expire in twenty years from the 14th day of January, 1868.

In the same year, on the 30th day of March, The East Cleveland Railroad Company applied to the Mayor and Common Council of the Village of East Cleveland for permission to extend its branch railroad upon certain streets in the said village, and upon that application an ordinance was passed by the Common Council of the Village of East Cleveland authorizing the company to construct a branch railroad on Garden and other streets in the village, beginning at the termination of its branch road at the easterly line of the City of Cleveland, in Willson Avenue, running thence easterly in the center of Garden Street to its intersection with the center line of Baden Street; thence southerly on said center line to the southerly line of Wade Street; the ordinance further providing that no work should be done under it until property owner consents had been filed, and on the same day certain preambles and a resolution were introduced and adopted by the Council of the Village of East Cleveland, reciting that notice for three consecutive weeks had been published requesting bids from

different corporations and individuals; that The East Cleveland Railroad Company had made the most favorable bid, and that therefore the right was granted as above described for the construction and operation of the railroad for the period of twenty years from its completion, the construction to be commenced and completed within a period of five years from the date of the passage of the resolution.

This last ordinance and resolution were accepted by the company (Record, pages 190 and 191), the written acceptance binding the railroad company to the terms and conditions thereof.

The situation then was that The East Cleveland Railroad Company owned three railroads, the Euclid Avenue line, expiring on the 20th day of September, 1879; the Garden Street line, in the City of Cleveland, expiring on the 14th day of January, 1888; and the Garden Street line in the Village of East Cleveland, expiring somewhere between the 30th day of March, 1888, and the 30th day of March, 1893, the expiration depending upon the date of the completion of the construction authorized. Each of these railroads was a separate original grant made as then authorized by statute to the person or corporation agreeing to carry passengers at the lowest rate of fare, and not as extensions of one another.

Additional privileges were granted to The East Cleveland Railroad Company and the Kinsman Street Railroad Company for the construction of tracks from the east line of the Public Square in Euclid Avenue and in Superior Street by a resolution adopted July 1, 1868, the rights being limited to expire on the 1st day of July, 1888, the provisions of which resolution were accepted by The East Cleveland Railroad Company (Record, page 192).

Year 1870.

On the 2nd day of August, 1870, The East Cleveland Railroad Company and the Village of East Cleveland made

an agreement by which the tracks of the company were removed from the southerly side of Euclid Avenue in the Village to the center of the street. This agreement was authorized by an ordinance of the Village passed August 2 (Record, page 193), but departs from the terms of that ordinance in many particulars (Record, pages 193, 195 and 196). Neither the ordinance nor agrement as executed have any relation whatever to the Garden Street line of the company.

YEAR 1873.

On the 25th day of February, by a resolution of the council of the City of Cleveland, authority was given to The East Cleveland Railroad Company to lay a double track in Prospect Street between Erie Street and Case Avenue, and in portions of Case Avenue and Euclid Avenue (Record, page 197). The provisions of this resolution, which relates exclusively to the Euclid Avenue line of The East Cleveland Railroad Company, were accepted on the first day of March, 1873 (Record, page 197).

On the 25th day of March by resolution, the council of the City of Cleveland authorized The East Cleveland Railroad Company to change the route of its Garden Street line by removing certain tracks from Brownell Street and installing a double track from their track in Brownell Street to Erie Street which resolution was accepted (Record, pages 199, 200), and on the same day by resolution the council of the City of Cleveland authorized the East Cleveland Railroad Company to double track its Garden Street line between Brownell Street and Willson Avenue (Record, page 200). This resolution was likewise accepted by the company. Neither resolution contained any statement as to the date of expiration of the right then granted, both being apparently appurtenances of the existing Garden Street line, and controlled by its date of expiration.

YEAR 1876.

On the 23rd day of May the council of the City of Cleveland passed an ordinance authorizing The East Cleveland Railroad Company to extend the Garden Street branch of its road along Garden Street to Baden Avenue, along Baden Avenue to Quincy Street, along Quincy Street to New Street and along New Street to Garden Street (Record, pages 115, 143 and 202). This ordinance provided that the rights therein granted, should continue for twenty years from that date, thus limiting them to expire on the 23rd day of May, 1896, and that the extension should be operated in connection with the Garden Street branch and the main line.

YEAR 1879.

On the 15th day of September the council of the City of Cleveland passed an ordinance making a grant of a renewal franchise to The East Cleveland Railroad Company in and through certain streets of the City of Cleveland. The ordinance was passed pursuant to a petition for a renewal (Record, page 203), and among the recitals of the ordinance by way of preamble is reference to an act of the Legislature of Ohio, passed on the 12th day of June, 1879, authorizing renewals of grants to street railroad companies upon such terms and conditions as the council may deem conducive to the public interest. In section one of the ordinance the route of the Euclid Avenue line of The East Cleveland Railroad Company is described by streets as comprising the streets and parts of streets on which the renewal of franchises is granted. There is a complete exclusion of any of the streets operated by the Garden Street line. By section 11 of the ordinance the council reserves the right to authorize a joint use of the tracks of The East Cleveland Railroad Company east of Erie Street, that is from the point at which the Euclid Avenue line was tapped by the Garden Street line. Section 12 of the ordinance provides that "the authority and privileges in this ordinance

named and provided for are to be and remain in force for the full period of twenty-five years from the 20th day of September, 1879." (Record, pages 115, 144 and 204.)

It is further to be noted that the renewal grant thus made extends only to Willson Avenue and does not affect tracks beyond that point; as more fully appears from an ordinance passed in the year 1883.

YEAR 1880.

On the 22nd day of March, 1880, the council of the City of Cleveland passed an ordinance authorizing The East Cleveland Railroad Company to extend the Garden Street branch of its railway from the then existing track at the intersection of Baden Avenue and Quincy Street in an easterly direction to the intersection of Quincy Street and Lincoln Avenue, and to equip and operate the extension so granted and the Garden Street branch for a period of twenty-five years from the passage of the ordinance. (Record, pages 116, 145 and 208.) All of the territory covered by the original East Cleveland grants to the Garden Street line was at this time included in the City of Cleveland and the effect of this ordinance was to cancel and annul all outstanding grants and to renew for a definite and fixed period all grants previously made either by the City of Cleveland or by the Village of East Cleveland, to which the City of Cleveland had succeeded, limiting them to expire on the 22nd day of March, 1905.

After the passage of this ordinance The East Cleveland Railroad Company's Euclid Avenue line to Willson Avenue was limited to expire on the 20th day of September, 1904, by virtue of the ordinance of September 15th, 1879. Its Euclid Avenue line beyond Willson Avenue was operating under grants from the Village of East Cleveland hereinbefore exhibited and its Garden Street line was limited to expire on the 22nd day of March, 1905.

Year 1883.

On the 4th day of April, 1883, the council of the City of Cleveland passed an ordinance authorizing The East Cleveland Railroad Company to extend its double track in Euclid Avenue from the west line of Willson Avenue to the East line of Fairmount Street. (Record, pages 145 and 209.)

Section 3 of this ordinance limits the duration of the right therein granted to the 20th day of September, 1904, which is by this ordinance described to be the date of the expiration of the renewal of The East Cleveland Railroad Company's Euclid Avenue line lying west of Willson Avenue.

After the passage of this ordinance and its acceptance, which appears in the Record at page 210, the situation was that the Euclid Avenue line throughout was limited to expire on the 20th day of September, 1904, and the Garden Street line throughout was limited to expire on the 22nd day of March, 1905. Each line was then operating under a general renewal grant which had absorbed and substituted all previous piece-meal grants and the acceptance of which constituted a surrender of any rights theretofore outstanding.

Year 1885.

On the 9th day of February the council of the City of Cleveland passed an ordinance to permit The East Cleveland Railroad Company to extend its Garden Street branch from the intersection of Quincy Street and Lincoln Avenue in an easterly direction to Woodland Hills Avenue (Record, pages 117, 146 and 211). The language of limitation used in this ordinance is incorrectly printed in the Record at page 211 and should read as follows:

> "To equip and operate said extension as a single track railroad, with all necessary switches, turnouts and turn-tables in connection with said branch and its main line and *terminating with the grant for the main line*, but with the express condition that no

increase of fares shall be charged by said company on any part of its main line or on said extension by reason of said extension."

The true language of this ordinance is alleged in the bill of complaint (Record, page 117) and in the answer (Record, page 146).

At the time of the passage and acceptance of this ordinance the Garden Street line was limited to expire on the 22nd day of March, 1905, and the Euclid Avenue line on the 20th day of September, 1904.

YEAR 1886.

On the 15th day of March the council of the City of Cleveland passed an ordinance authorizing The East Cleveland Railroad Company to extend its double track street railroad in Euclid Avenue easterly from Fairmount Street to the easterly limits of the city, which ordinance was duly accepted (Record, pages 212, 213).

Section 5 of that ordinance provides that the rights therein granted shall cease and terminate on the 20th day of September, 1904, as provided for the company's tracks in Euclid Avenue west of Fairmount Street, which, of course, means the entire Euclid Avenue line of The East Cleveland Railroad Company.

In this year also, on the 16th day of July, the council of the City of Cleveland passed an ordinance authorizing The East Cleveland Railroad Company and The Brooklyn Street Railroad Company to extend their tracks and operate their railroads on Water, Lake and Bank Streets (Record, pages 214, 215). By section 4 of that ordinance it is provided that the right therein granted should expire on the part of each company with the grant for its main line respectively.

YEAR 1887.

On the 17th day of June the council of the City of Cleveland passed an ordinance to permit The East Cleveland Railroad Company to extend its Garden Street branch from the intersection of Baden Avenue and Garden Street, upon Garden Street to Lincoln Avenue (Record, pages 118 and 217). The language of limitation was (Record, page 217) that the right then granted should terminate with the grant for "*The Garden Street main line,*" which, as we have seen, was fixed by the ordinance of 22nd day of March, 1880, as the 22nd day of March, 1905.

YEAR 1888.

On the 13th day of July the council of the City of Cleveland passed an ordiance authorizing The East Cleveland Railroad Company to change its motive power upon certain portions of its line from horse power to electric power (Record, pages 118, 148 and 219). This ordinance was accepted by the Railroad Company (Record, page 221), and by its provisions, the right is granted to operate by electric power upon certain designated streets, all of them included within the Euclid Avenue line of The East Cleveland Railroad Company.

From section 1 of this ordinance it appears that an application was made for the right granted, the application being limited to the streets named in the granting clause of the ordinance. By section 6 of the ordinance it is provided that the privilege of constructing the electric system and the operation of its lines, as thereinbefore provided,

> "shall be in force for a period of twenty-five years from the date of the passage of this ordinance upon its main and Cedar Avenue lines."

The Cedar Avenue line, so-called, was a mere extension of the Euclid Avenue line and the date of the expiration of the Euclid Avenue line, as we have seen, was at this time the 20th day of September, 1904. After the passage and accept-

ance of this ordinance the date of expiration upon the Euclid Avenue and Cedar Avenue lines became the 13th day of July, 1913.

YEAR 1889.

The council of the City of Cleveland required The East Cleveland Railroad Company to electroquip certain portions of its Euclid Avenue line and Cedar Avenue line under the right reserved in the ordinance of July 13, 1888.

YEAR 1890.

On the 10th day of March, 1890, the council of the City of Cleveland passed an ordinance which was accepted by The East Cleveland Railroad Company, authorizing it to substitute electric motive power for horse-power upon the Garden Street branch of its railroad (Record, pages 119, 149 and 225). This ordinance in section 1 describes the route of the then existing Garden Stret line, naming the streets and parts of streets comprising it, and authorizing the company to erect and maintain on said streets, all necessary poles and wires, the necessary appliances and fixtures for the conducing of electrical currents to operate by electric power "the said Garden Street branch during the term of its present grant for said Garden Street branch." This term was, as we have seen, until the 22nd day of March, 1905, as fixed and determined by the ordinance of the 22nd day of March, 1880. There is no language in this ordinance which in any way requires the operation of this line in conjunction with any other line of The East Cleveland Railroad Company.

After the acceptance of this ordinance (Record, page 226), The East Cleveland Railroad Company's Euclid Avenue and Cedar Avenue lines were electrically operated and were limited to expire on the 13th day of July, 1913. The Garden Street line was electrically operated and limited to expire the 22nd day of March, 1905.

YEAR 1891.

On the 30th day of March the council of the City of Cleveland pased an ordinance, duly accepted by The East Cleveland Railroad Company, granting the right to construct and operate a second or additional track on Central Avenue, formerly known as Garden Street, from the east line of Willson Avenue to the right of way of The Cleveland & Pittsburgh Railway Company, the language of limitation being that the right therein granted should expire with the grants for the company's main line. This track was a part of the Garden Street road. The company's Euclid Avenue and Cedar Avenue lines expire in 1913, and the company's Garden Street line in 1905, and at least in one prior ordiance, namely that of June 17, 1887, the council of the City of Cleveland had used the language, "The Garden Street main line."

It is to be noted that this ordinance does not attempt to extend existing rights but by section 4 fixes the expiration of the right "*therein* granted."

On the 20th day of April the council of the City of Cleveland passed an ordinance granting to The East Cleveland Railroad Company permission to lay an additional or second track in Quincy Street from New Street to Woodland Hills Avenue (Record, pages 121, 150 and 288).

By section 3 of this ordinance it is provided,

> "The right herein granted shall be valid until the expiration of the grants for said company's tracks on Quincy Street east of Lincoln Avenue, to-wit, July 13, 1913."

The fact was that the rights of the company for tracks in Quincy Street east of Lincoln Avenue did not expire July 13, 1913, the right to those tracks having been granted in the year 1885 by the ordinance of Feb. 9th, the language of which ordinance was that the right should expire with the grant "for the main line."

At the time of the passage of the ordinance of 1885 The Euclid Avenue line was limited to expire September 20th, 1904, and the Garden Street line March 22, 1905, and when the ordinance of July 13, 1888 was passed by which the Euclid Avenue line grant was prolonged to July 13, 1913, no reference whatever was made to any tracks owned by the company in Quincy Street east of Lincoln Avenue. Moreover, on the 10th day of March, 1890 (Record, page 225), the council had passed an ordinance authorizing the substitution of electric power over the entire Garden Street line, including the tracks in Quincy Street east of Lincoln Avenue, and limiting the entire grant to expire during the term of the Company's then present grant for the Garden Street branch, so that by the two ordinances of March 22, 1880, and March 10, 1890, the tracks of the Garden Street line in Quincy Street east of Lincoln Avenue had been separated from any connection with the main line, if by that term was originally meant the Euclid Avenue line, and made a part of the Garden Street line, with a common period of expiration, viz., 22nd day of March, 1905.

YEAR 1893.

On the 22nd day of May the Cleveland Electric Railway Company addressed a communication to the council of the City of Cleveland informing it that The Cleveland Electric Railway Company has been organized on the 25th day of March by the consolidation of the East Cleveland Railroad Company and the Broadway and Newburgh Street Railway Company; that it had been further subsequently enlarged on the 24th day of April by consolidation with the Brooklyn Street Railroad Company and South Side Street Railroad Company; that these consolidations had been made under advice of counsel and were believed to be legal and valid in all respects; that in as much as question had arisen as to the intention of the new company, it desired officially to state to the council

> "That *it does not claim any greater rights than the constituent companies forming the organization;* that it intends to obey all the ordinances under which it and all of the constituent companies were subject; that it has, since such consolidation has been effected, issued transfer checks to all persons desiring them, to enable such persons to have a continuous ride from any east side line to any south side or west side line, and from any south or west side line of the company to any east side line, for one fare, and will continue such system of transfers where it could not better accommodate its patrons by such through lines as it may establish."

Subsequently thereto, on the 29th day of May, the council of the City of Cleveland passed a resolution assenting to this consolidation (Record, pages 230, 231).

On the 17th day of July, the council passed an ordinance authorizing The Cleveland Electric Railway Company to extend its tracks in certain portions of Prospect Street, Seneca Street, Lake Street and Ontario Street, limiting the right thereby granted to expire on the 13th day of July, 1913, and conditioning it upon the continued compliance by The Cleveland Electric Railway Company with the terms and conditions of the resolution adopted assenting to the consolidation previously made. The ordinance nowhere refers to the Garden Street line.

At this time The Cleveland Electric Railway Company as a consolidated company, owned the lines previously owned by The East Cleveland Street Railroad Company, to-wit, the Euclid Avenue and Cedar Avenue lines, limited to expire July 13, 1913; the Garden Street line, limited to expire March 22, 1905; the line owned by the Broadway & Newburg Street Railway Company, limited to expire July 1, 1914; the line of The Brooklyn Street Railway Company, limited to expire January 26, 1910; the line of The South Side Street Railway Company, limited to expire October 5, 1913; and the lines of The West Side Street Railway Company, limited to expire February 10, 1908.

YEAR 1894.

On the 19th day of February, 1894, the council of the City of Cleveland passed an ordinance entitled,

> "An ordinance granting permission to The Cleveland Electric Railway and The Cleveland City Railway Company, to extend their tracks in Willson Avenue,"

which was duly accepted by both companies (Record, pages 123, 152, 235). By the terms of this ordinance permission is granted to The Cleveland Electric Railway Company to extend its double track street railroad along Willson Avenue from its present tracks at the intersection of Scovill and Willson Avenues to the present tracks at the intersections of Perkins and Willson Avenues, and from its present tracks at the intersection of Hough and Willson Avenues to the northerly terminus of said Willson Avenue, with the necessary curves and connecting tracks, and permission was granted to The Cleveland City Railway Company to extend its double track railroad on and along Willson Avenue from its present tracks at the intersection of Woodland and Willson Avenues to the intersection of Lexington and Willson Avenues, and from its then present tracks at the intersection of Payne and Willson Avenues to the northerly terminus of Willson Avenue. The tracks thus authorized to be extended by The Cleveland Electric Railway Company were the tracks of its Scovill line, previously the property of The Brooklyn Street Railway Company, then limited to expire the 26th day of January, 1910, and the tracks of its Wade Park extension of the Euclid Avenue line, then limited to expire the 13th day of July, 1913. The tracks authorized to be extended by The Cleveland City Railway Company were the tracks of its so-called Payne Avenue line, then limited to expire the 26th day of January, 1910, and the tracks of the Woodland Avenue line, then limited to expire in 1908. By the terms of the ordinance the tracks and appliances authorized were required to be jointly constructed,

and each company was given the right to occupy and use them. By the language of Section 1, it is provided that the tracks are to be constructed and operated in connection with the existing tracks in Willson Avenue "*as a double track street railroad.*" By Section 10 it is provided

> "And this grant shall be in force until the 1st day of July, 1914."

Various conditions and requirements as to the mode of construction and operation of the railroad thus authorized are provided, and reservations are made to the council of the right to enforce the transfer of passengers from the various lines operated by the two companies to the new railroad. Section 6 of the ordinance (Record, page 236), provides that passengers on any line of either of the companies intersecting or coming to Willson Avenue, including the lines on Broadway, shall be entitled to reciprocal transfers without additional payment. This ordinance, beyond the provisions pointed out, contains no language of renewal or re-grant as to any lines operated by either company at that time.

On the 25th day of June, the council of the City of Cleveland passed an ordinance granting to The Cleveland Electric Railway Company the right to extend and operate its double track street railway then operated in Quincy Street from New Street to Willson Avenue. This was a portion of the Garden Street line constructed and owned by The East Cleveland Railroad Company, predecessor in title to The Cleveland Electric Railway Company. By Section 6 of this ordinance it is provided that the grant therein made shall terminate with the grant for said company's present line in Quincy Street. This ordinance, it will be observed, is subsequent to the Willson Avenue grant about four months, and makes the date of expiration specifically that of the Quincy Street line, and not of any general renewal grant attempted to be inferred from the provisions of the ordinance of February 19, 1894.

YEAR 1903.

On or about the 1st day of July, 1903, The Cleveland Electric Railway Company acquired by purchase all the property of The Cleveland City Railway Company, and from that time the property of these two companies has been operated by the complainant. The record shows no action by the council of the City of Cleveland sanctioning or recognizing this consolidation or purchase of these two companies which prior to that time had operated independently, and the fact is that the purchase by the complainant of the property of The Cleveland City Railway Company was never acted upon in any way by the council of the City of Cleveland, but was a consolidation initiated and carried out by the companies themselves without consulting in any way the public authorities.

A very large number of ordinances dealing with lines operated by the complainant company, and by various competing and independent lines, were passed by the council of the City of Cleveland during all the period covered by the foregoing chronological statement. Their importance, so far as this case is concerned, is illustrative, and they have been omitted from the statement in order to avoid confusion. By stipulation of counsel, a considerable number of these ordinances have been printed and will be submitted to the Court with the Record. The foregoing statement, however, refers specifically to every ordinance which affects the length of life of the grants of the Euclid Avenue line and the Garden Street line of The East Cleveland Street Railroad Company, or its successor, The Cleveland Electric Railway Company.

THE STATUATES OF OHIO RELATIVE TO THE CONSTRUCTION, EXTENSION AND CONSOLIDATION OF STREET RAILROADS, AND THE RENEWAL OF THE RIGHT TO OPERATE THEM.

For the purposes of this case the statutes of Ohio as they existed on the 19th day of February, 1894, and prior thereto, are important. Subsequent to that date no ordinance directly affecting the subject matter here in controversy was passed, and so far as the power of municipal corporations to deal with the subject matter of street railroads is concerned, no important change has been made since that time.

There are two sets of sections in the codified statutes of Ohio relating to the construction and operation of street railroads in cities. The sections known in 1894 as Sections 2501 and the following, appear in the chapter of the statutes devoted to the law governing municipal corporations. Sections 3437 and the following appear in the chapter of the statutes relating to railroads. In part these two bodies of law are coincident, and their language while not always the same, has been given an identical interpretation.

The things which are authorized by the Ohio statutes to be done by municipal corporations with reference to street railroads are:

1. The making of original grants.
2. The renewals of existing grants.
3. The extension of existing or authorized tracks.
4. Fixing the terms and conditions upon which consolidations may be made.

In like manner, under favor of these various statutes, street railroad companies are authorized to apply for and receive original grants; to apply for and receive renewals of existing grants; to apply for and receive authority to extend existing

or authorized tracks; to consolidate with other street railroad companies, and to acquire by purchase the rights of other street railroad companies. The following sections exhibit so much of the statutory law of Ohio as is material here, and the dates of the passage of the various sections are indicated, in order that the state of the law at the time of the passage of any of the various ordinances in evidence here may be determined:

> "Section 2501. No corporation, individual or individuals, shall perform any work in the construction of a street railroad, until application for leave is made to the council in writing, and the council by ordinance shall have granted permission, and prescribed the terms and conditions upon, and the manner in which the road shall be constructed and operated, and the streets and alleys which shall be used and occupied therefor; and cities of the first and second grade of the first class, and of the second grade of the second class may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest."

This section is given in the form received by it by the act of March 4, 1887. It was not again amended until 1896. Its original enactment was as part of the general municipal code of 1869.

> "Section 2502. Nothing mentioned in the next preceding section shall be done; no ordinance or resolution to establish or define a street railroad route shall be passed, and no action inviting proposals to construct and operate such railroad shall be taken by the council, except upon the recommendation of the board of public works in cities having such a board, and of the board of improvements in other municipalities having such a board; and no ordinance for the purpose specified in said preceding section shall be passed until public notice of the application therefor has been given by the clerk of the corporation in one or more of the daily papers, if there be

such, and if not then in one or more weekly papers published in the corporation, for the period of at least three consecutive weeks; and no such grant as mentioned in said preceding section shall be made, except the corporation, individual or individuals that will agree to carry passengers upon such proposed railroad at the lowest rates of fare, and shall have previously obtained the written consent of a majority of the property-holders upon each street or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting on the several streets along which such road is proposed to be constructed; provided, that no grant nor renewal of any grant for the construction or operation of any street railroad shall be valid for a greater period than twenty-five years from the date of such grant or renewal; and after such grant or renewal of a grant is made, whether by special or general ordinance, the municipal corporation shall not, during the terms of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal of a grant."

This section is given in the form contained in the amendment made by the act of March 20, 1884. The substance of this act, so far as it affects this litigation, has remained unchanged since 1878, prior to which time the provision limiting grants to twenty-five years did not exist.

"Section 2502-a. That the release prohibited by section 2502 of the Revised Statutes may be given or made, except as to paving and repairing streets, whenever it involves a change of motive power from animal power to cable or electric power or other means for rapid transit or an additional obligation to pave or repair and keep in repair the streets along the line of railway or portion thereof; and in every such case such release may be made on such reasonable terms, including such extension of time as now authorized by law, as may be prescribed by ordinance,

and any release or change or extension of time of any grant heretofore made involving any such change of motive power or additional obligation to pave or repair and keep in repair as aforesaid, shall be as valid and binding as if such change or obligation had been made under this act, and this shall apply to actions and causes of action mentioned in section 79 of the Revised Statutes; provided, however, there shall not be any change made in the percentage on gross earnings and car license fees that may be required to be paid on such street railway route or routes or any portions of the same or in any extension of such route or routes; and whenever any rapid transit street railway route operated by cable or electric power has been, or shall be extended over the tracks of another route belonging to the same company, corporation, individual or individuals, upon which the cars are operated by horse power, the company, corporation, individual or individuals owning and operating such horse power route shall be no longer required or allowed, except to make necessary connections, to operate the same, and the right to operate horse cars over such route, or such portions of the same as a rapid transit route has been or may be extended over, shall be regarded as surrendered and abandoned by the acceptance of such extension; and provided further, that any ordinance or resolution relating to a street railroad, passed or adopted by the legislative or other municipal authorities of any municipal corporation of this state by improperly suspending the rules requiring the same to be read on three different days, or by improperly putting the same on its passage with one or more other ordinances or resolutions instead of taking a separate vote on the same, shall nevertheless be valid, and this also shall apply to actions and causes of action named in section 79 of the Revised Statutes."

This section was passed April 21, 1893, 90 O. L., 228-229, and repealed May 14, 1894, 91 O. L., 229.

"Section 2504. (Pavement of streets where railroads are constructed; proviso.) The council may require any part or all of the track, between the rails of any street railroad constructed within the corporate limits, to be paved with stone, gravel, boulders, or the Nicholson or other wooden or asphaltic pavement, as may be deemed proper, but without the corporate limits paving between the rails with stone, boulders, or the Nicholson or other wooden or asphaltic pavement shall not be required; provided, that in cities of the second grade of the first class, the council may require of any street railroad company to pave and keep in constant repair, sixteen feet for a double track or seven feet for a single track, all of which pavement shall be of the same material as the balance of the street is paved with."

This section, in substantially its present form, was a part of the municipal code of 1869 (66 O. L., 217).

"Section 2505. (Council of city or village may grant extension of street railroad.) The council of any city or village may grant permission, by ordinance, to any corporation, individual, or company owning, or having the right to construct, any street railroad, to extend their track, subject to the provisions of sections three thousand four hundred and thirty-seven, three thousand four hundred and thirty-eight, three thousand four hundred and thirty-nine, three thousand four hundred and forty, three thousand four hundred and forty-one, three thousand four hundred and forty-two, and three thousand four hundred and forty-three, on any street or streets where council may deem such extension beneficial to the public; and when any such extension is made, the charge for carrying passengers on any street railroad so extended, and its connections made with any other road or roads, by consolidation under existing laws, shall not be increased by reason of such extension or consolidation."

This section is given in the form contained in the revision of the statutes of 1880; in its original form it was an act of the General Assembly passed May 7, 1869, and read as follows:

> "That it shall be lawful for the council of any city or incorporated village to grant permission by ordinance to any person or company owning or having the right to construct any street railroad, to extend their track, subject to the provisions of Sections 4 and 5 of said act, passed March 27, 1866, on any street or streets where the said council shall deem such extension beneficial to the public. And when any such extension shall be made the charge for carrying passengers on any street railroad so extended and its connections made with any other road or roads by consolidation under existing laws, shall not be increased by such extension or consolidation. Said sum shall include the government tax."

This was the first statutory authority for extensions, so-called.

> "Section 2505-a. Any corporation or company organized for street railway purposes, may lease or purchase any street railroad, or street railroads, or railroad operated as a street railroad and by electric power or inclined plane railroad or railroads, together with all the property, real, personal and mixed, and all the franchises, rights and privileges respecting the use and operation of such railroad or railroads, situate or existing in whole or in part within this state, constructed and held by any other corporation or company, corporations or companies, the latter being hereby vested with corresponding power to let or sell, upon such terms and conditions as may be agreed upon between the corporations or companies; and any two or more of such corporations or companies may enter into any arangement for their common benefit consistent with and calculated to promote the objects for which they are created. No such lease or purchase shall be perfected until a meet-

ing of the stockholders of each of the companies has been called for that purpose by the directors thereof, on thirty days' notice to each stockholder, at such time and place, and in such manner, as is pro-provided for annual meetings of the companies, and the holders of at least two-thirds of the stock of each company, in person or by proxy, at such meeting, or at any properly adjourned meeting, assent thereto. Provided, that any stockholder who refuses to assent to such lease or sale and signifies the same by notice in writing to the lessee or purchaser within ninety days thereafter, shall be entitled to demand and receive compensation in the manner provided for the compensation of stockholders in sections 3302, 3303 and 3304 of the Revised Statutes, and the said sections are adopted and made to be part of this section. Provided that whenever any such consolidation is made as herein provided, there shall be no increase of the existing rates of fare by reason of such consolidation nor shall any fare be charged upon any of the separate routes so consolidated in excess of the fare charged over such separate routes, prior to the consolidation thereof; and provided that when any such consolidation is made as herein provided, the fare charged for one continuous route or ride over all such consolidated lines shall not exceed the maximum fare charged over any one of said lines prior to such consolidation."

"Section 2505-b. Whenever the lines or authorized lines of road of any street railroad corporations or companies meet or intersect, or whenever any such line of any street railroad corporation or company and that of any inclined plane railway or railroad corporation or company or any railroad operated by electricity may be conveniently connected or be operated to mutual advantage, such corporations or companies, or any two or more of them, are hereby authorized to consolidate themselves into a single corporation, or whenever a line of road of any street railroad company or corporation organized

in this state is made, or is in process of construction, to the boundary line of the state, or to any point either in or out of the state, such corporation or company may consolidate its capital stock with the capital stock of any corporation or company, corporations, or companies, in any adjoining state, the line or lines of whose road or roads have been made, or are in process of construction, to the same point or points, in the same manner and with the same effect as provided for the consolidation of railroad companies in sections 3381 (as amended), 3382, 3383 (as amended), 3384, 3385, 3386, 3387, 3388, 3389, 3390, 3391, 3392 and 9805 of the Revised Statutes, and in any and all acts amendatory and supplementary to said sections and each of them; and the said sections so amended and supplemented are adopted and made to be part of this section."

The foregoing sections are part of the act of May 1, 1891, and were therefore in force at the time of the consolidation of The Cleveland Electric Railway Company in 1893, and at the time of the passage of the ordinance of July 17, 1893. In the same act it was provided by the second section as follows:

"Nothing in this act shall be construed to extend the term of any grant by a municipal corporation, and no such consolidation shall in any way extend or enlarge any of the rights of any of the separate roads so consolidated."

"Sec. 3437. Street railways, with single or double tracks, side-tracks, and turn-outs, may be constructed or extended within or without, or partly within and partly without, any municipal corporation or unincorporated village; and offices, depots and other necessary buildings for such railways may also be constructed."

This section was originally passed February 19, 1870.

"Section 3438. The right so to construct or extend such railway within or beyond the limits of a

municipal corporation can be granted only by the council thereof, by ordinance, and the right to construct such railway within or beyond the limits of an unincorporated village can be granted only by the county commissioners, by order entered on their journal; and after said grant or renewal of any grant shall have been made, whether by general or special ordinance, or by order of the county commissioners, neither the municipal corporation nor the county commissioners shall release the grantee from any obligations or liabilities imposed by the terms of said grant or renewal of a grant during the term for which said grant or renewal shall have been made. Provided, that no authority shall be given by such municipal or county authorities, to occupy the track, whether single or double, or other structure, of any existing street railways for more than one-eighth of the entire distance between the termini of the route, as actually constructed, operated and run over, of the company or individual to whom such grant is made; except, however, in granting permission to extend existing routes in cities of the first, second and third grade of the first class, and first grade, second class, such cities, and the companies owning such route, shall have the same rights and powers they have under the laws and contracts now existing; and that no extension of any street railroad located wholly without any such city, or of any street railroad wherever located, which has been or shall be built in pursuance of a right obtained from any source or authority other than a municipal corporation, shall be made within the limits of such city, except as a new route, and subject to the provisions of sections *two thousand five hundred and one*, and *two thousand five hundred and two.*"

"Section 3439. No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the streets or pub-

lic way, along which it is proposed to construct such railway or extension thereof; and the provisions of sections *two thousand five hundred and one* and of *two thousand five hundred and three* to *two thousand five hundred and five,* inclusive, so far as they are applicable, shall be observed in all respects, whether the railway proposed is an extension of an old or the granting of a new route; provided that this act shall not apply to any county containing a city of the second grade of the second class."

"Section 3441. If the public road, along which the railway is to be constructed, is owned by a person or company, or is within the control or management of the board of public works or other public officer, such person, company, or officer may agree with the person or company constructing the railway as to the terms and conditions upon which the road may be occupied."

"Section 3443. Council or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended and consolidated."

CLAIMS OF THE CLEVELAND ELECTRIC RAILWAY COMPANY.

If counsel for The Cleveland Electric Railway Company urge here the views presented in the court below they will be found to claim:

1. That certain of the Euclid Avenue and Garden Street lines are operated under perpetual grants and that so far as this claim affects the Garden Street line the decree of the court below should have recognized the existence of this claim to perpetual right.

2. That the date of the right to operate the Garden Street line was prolonged to the 13th day of July, 1913, by the ordinance of April 20th, 1891, and certain other ordinances to be read in connection therewith.

3. That the ordinance of February 9th, 1894, creating the Willson Avenue cross-town line by the imposition of a requirement for reciprocal transfers between the Willson Avenue and intersecting lines automatically extended the grants of all such intersecting lines to the dates fixed for the Willson Avenue expiration, namely July 1, 1914.

4. That the growth of the system operated by the complainant has been such that it would inconvenience the complainant and interfere with its method of operation were the original dates of expirations of the several constituent parts of its system to expire at different dates.

It is claimed that council of the City of Cleveland has so far recognized the existence of the complainant system as to lead to the inference that its continued operation as a system must exist in all its parts until the expiration of its longest grant.

These contentions must be examined separately, but it may not be improper briefly to state the general principles of construction applicable to ordinances of municipal corporations exercised under a power delegated by the Legislature of the state for the enfranchisement of private companies with public privileges.

PRINCIPLES OF CONSTRUCTION.

That ordinances of municipal corporations making grants, to private companies for profit of rights in the public streets, constitute contracts and are protected from impairment by the Constitution of the United States is too well settled by the decisions of this Court to justify citation of authority. The sole questions presented here upon such a case as the one at bar are not whether this Court will enjoin the impairment of the contract nor whether an ordinance making a grant of a public right or privilege to a private company is a contract, but are, whether such a contract is within the pow-

ers of the municipal corporations, and second, what is the contract?

The decisions of this Court in the cases of the *City of Cleveland vs. Cleveland City Railway Company*, 194 U. S., 517, and the *City of Cleveland vs. Cleveland Electric Railway Company*, 201 U. S., 529, have definitely settled the first of these questions: It is there said:

> "The statutes show that there was lodged by the Legislature of Ohio in the Municipal Council of Cleveland, comprehensive power to contract with street railway companies in respect to the terms and conditions upon which roads might be constructed, operated, extended and consolidated, the only limitation upon that power being that in case of an extension or consolidation no increase in the rate of fare should be allowed."

It is not contended in this action that the council of the City of Cleveland has in any of the ordinances above referred to, exceeded its statutory powers but it is confidently asserted by the city that its various ordinances do not in express terms confer the rights claimed by The Cleveland Electric Railway Company and that no interpretation of them which either recognizes or confers such rights as are claimed can be made without violence to the language used in the ordinances themselves and without an entire disregard of the intention of the legislative body of the City of Cleveland, as shown in all its dealings with this company and its predecessors in relation to the prolongation of its rights.

> "The words of a private grant are taken most strongly against the grantor though if the meaning cannot be discovered the instrument is void. But this rule is reversed in cases of public grants. They are construed strictly in favor of the government on grounds of public policy. If the meaning of the words be doubtful in a grant designed to be of general benefit to the public they will be taken most

strongly against the grantee and for the government and therefore should not be extended by implication in favor of the former beyond the natural and obvious meaning of the words employed." *2 Lewis' Sutherland Statutory Construction,* Section 548.

The above citation is based upon and supported by the holding of this Court in the case of the *Central Transportation Company vs. The Pullman Palace Car Company,* 139 U. S., 24.

In that case this Court said:

"By a familiar rule every public grant of property or of privileges or franchises if ambiguous is to be construed against the grantee and in favor of the public, because an intention on the part of the government to grant to private persons or to a particular corporation, the property or rights in which the whole public is interested cannot be presumed unless unequivocally expressed or necessarily to be implied in the terms of the grant *and because the grant is supposed to be made at the solicitation of the grantee and to be drawn up by him or his agents and therefore the words used are to be treated as those of the grantee, and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee by the insertion of ambiguous language to take what could not be obtained in clear and express terms."*

Citing

Charles River Bridge vs. Warren Bridge, 11 Peters, 420;

Dubuque & Pacific R. R. Co., vs. Litchfield, 23 Howard, 66;

Slidell vs. Grandjean, 111 U. S., 412.

The language of Mr. Justice Gray above quoted but states aptly the rule which has been applied generally in American courts, and its endorsement in this Court has been so frequent and unbroken that it has now become as arbi-

trary and uncompromising a presumption of law as the rule in Shelly's case.

Cases stating and applying the rule in the Federal courts are:

Charles River Bridge vs. Warren Bridge, 11 Pet., 420;

Minturn vs. Larue et al., 23 Harvard, 435;

Thomas vs. City of Richmond, 12 Wallace, 353;

City of Detroit vs. Detroit City Ry. Co., 61 Fed., 161;

Citizens Ry. Co. vs. Detroit, 171 U. S., 48;

citing with approval the language of Mr. Justice Jackson in *Grand Rapids Electric Light and Power Company vs. Grand Rapids*, 33 Fed., 659;

Freeport Water Co. Freeport, 180 U. S., 598.

The most recent application of this rule adversely to claims of grant by presumption is in the case of *Water Company vs. Knoxville*, 200 U. S., 22, where this Court says:

> "Although the doctrines which must control in determining the scope of such a grant are clearly settled and are familiar, it may be well to recall the words of some of the adjudged cases. In *Charles River Bridge vs. Warren Bridge*, 11 Pet., 420, 544, 547, 548, the doctrine announced was that government, possessing powers that affect the public interests, and having entered into a contract involving such interests, is not, by means merely of implications or presumptions, to be disarmed of powers necessary to accomplish the objects of its existence; that any ambiguity in the terms of such a contract 'must operate against the adventurers and in favor of the public, and the plaintiffs can claim nothing that is not clearly given by the act'; that 'it can never be assumed that the Government intended to diminish its power of accomplishing the end for which it was

created'; and that those who insist that the Government has surrendered any of its powers or agreed that they may be diminished, must find clear warrant for such a contention before it can be heeded. 'Grants of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public.' Such were the words of this Court in *Turnpike Co. vs. Illinois*, 96 U. S., 63, 68. The universal rule in doubtful cases —this Court said in *Oregon Railway Co. vs. Oregonian Ry. Co.*, 130 U. S., 1, 26—is that 'the construction shall be against the grantee and in favor of the government.' As late as *Coosaw Mining Co. vs. South Carolina*, 144 U. S., 550, 562, this court said: 'The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the Government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. This principle, it has been said, is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.' *Slidell vs. Grandjean*, 111 U. S., 412, 438. We have never departed from or modified these principles, but have reaffirmed them in many cases.

"It is true that the cases to which we have referred involved in the main the construction of legislative enactments. But the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect of matters that concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict

the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings."

So far, then, as this Court is concerned, the rule of strict construction applies with unimpaired force alike to legislative enactments properly so-called, and to contracts affecting the public interest made by municipal corporations.

The text writers recognize the especial force of this rule as applying to street railway grants. Thus, *Booth on Street Railways*, says, in Section 33:

> "In accordance with this principle, words and phrases in statutes conferring franchises on corporations must receive that interpretation which is most favorable to the public."

And in Section 43 of the same book he says:

> "As repeals by implication are not favored and the rule of strict construction against the grantee is strictly applied to the franchise of private corporations, a corporation will not be permitted to enjoy franchises beyond the expiration of its original charter unless that intention has been clearly expressed by the granting power. *Amendatory and supplementary acts or ordinances* will not have that effect unless the intention to renew be expressed in apt terms, and any ambiguity in the language used will be resolved in favor of the state."

Citing among others the case of *New Orleans and Carrollton R. R. Co. vs. New Orleans*, 34 La. Ann., 429.

Judge Cooley, in his work on *Constitutional Limitations*, page 488 and the following, discusses this subject with a careful analysis of the authorities. His conclusion is:

> "Such grants, however, which confer upon a few persons what cannot be shared by the many, and which though supposed to be made on public grounds are nevertheless frequently of great value to the corporators, and therefore sought with avidity, are never

to be extended by construction beyond the plain terms in which they are conferred. No rule is better settled than that charters of incorporation are to be construed strictly against the corporators. The just presumption in every such case is that the state has granted in express terms what it designed to grant at all. 'When a state,' says the Supreme Court of Pennsylvania, 'means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the power which belongs to her, it is so easy to say so that we will never believe it to me meant when it is not said. * * * In the construction of a charter to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation. If the usefulness of the company would be increased by extending (its privileges), let the legislature see to it, and let it be remembered that nothing but plain English words will do it.' This is sound doctrine, and should be vigilantly observed and enforced."

In Ohio this rule has been recognized and applied from the earliest history of the state. In the case of *Bank vs. Toledo*, 1 O. S., 622, it is said on page 636:

"If there be anything well settled in the law relating to corporations, it is that their charters being grants of power or authority in derogation of the natural rights and equality of men, must be construed favorable to the public, and strictly against the corporation in whose favor nothing can be claimed by implication."

Straus vs. Eagle Insurance Company, 5 O. S., 59;
State vs. Vanderbilt, 37 O. S., 590-640;
Zanesville vs. Gas Light Company, 47 O. S., 31;
State vs. Eagle Insurance Company, 50 O. S., 252-268.

From the foregoing it sufficiently appears that in Ohio, and generally in the United States, the courts construing statutes and municipal ordinances conferring public rights upon private persons, resolve every doubt in favor of the public and

against the claim made on behalf of the grantee, and as this has been the rule of construction from the earliest times, a corollary derived from it imposes upon private corporations seeking grants of public rights to see to it at their peril that the thing which they desire to secure is expressed in plain and unequivocal language in the act of the public body. During the entire time that all of the ordinances here under consideration were being passed and accepted, the law holds The Cleveland Electric Railway Company and its predecessors to have been preparing the language of the grants to be enacted in their favor, and charges them with having written into those grants, in plain and unmistakable terms, all that they were then seeking to secure, with full knowledge that they would be estopped by the operation of this conclusive presumption from subsequently claiming any enlargement of the things specifically stated to be granted by implication or inference, or from any contention that the nature of their enterprise had grown to be such that its convenient operation would be furthered and benefited by implied extensions of the language originally used.

The force of this suggestion is particularly applicable to the contention of the complainant as to the growth of its system, and the relation of the tracks in controversy here to the operation of that system. For the present, however, we turn to an examination of the claims of the complainant in the order stated.

CLAIM AS TO PERPETUAL RIGHTS.

This claim proceeds upon the two-fold theory, first, that some of the original grants of The East Cleveland Railroad Company, both upon its Euclid Avenue line and its Garden Street line, contained no specific limitation of time; and second, that while others of the early grants to The East Cleveland Railroad Company did contain specific limitations

of time, yet that prior to the act of May 14, 1878, the legislature of the State had not imposed any limitation upon the power of municipalities with respect to the time for which a right to use the streets for street railroad purposes could be granted, and that attempts on the part of municipalities to impose such limitations in the absence of express statutory authority were *ultra vires.*

It is true that the act of May 14, 1878, contains the first prohibition upon municipal authorities as to the length of grants authorized to be made by them, limiting such grants to the maximum period of twenty-five years, but this Court has held that the councils of municipalities in Ohio have comprehensive power to make contracts with street railroad companies except in those particulars in which a specific limitation is imposed by statute, (*State vs. The Cleveland City Railway Company*, 194 U. S., 517) and this holding is in entire accord both with the theory of the legislation of Ohio on the subject of street railroads, and with the interpretation which has been put upon that legislation by the courts. In the case of *Louisville Trust Company vs. City of Cincinnati*, 76 Fed. Rep., 296, the Circuit Court of Appeals for the sixth circuit, was called upon to examine the street railroad legislation of Ohio. In that case it was contended that because the State had imposed no limitation upon the duration of the corporate franchises of the company, therefore the term for which it held street grants was likewise intended to be unlimited. The Court says that this argument is illogical:

> "It loses sight of the distinction between those franchises conferred by the state and obtained by organization under the state law, and those property or contractual franchises not granted by the state and not inherent in the corporation as such, but which come from a local authority having the right to grant the right to occupy a public highway. We do not mean to intimate that a municipal or local authority is the only source from which such an easement could come

in Ohio. The legislative history of the state is such, however, as to indicate that the settled public policy of the state is not to confer such easements, but to refer all such companies to the municipality upon whose streets or highways they wish to exercise the franchises conferred by the state for the requisite street easements, upon terms and conditions to be agreed upon between such companies and local government. When, therefore, we come to construe an Ohio statute providing for the organization of either ordinary railway or street car companies, we may well do so with the expectation that this settled policy has not been departed from, and that the state has stopped with the grant of the usual and necessary corporate franchises proper, by which it has been endowed with power to operate its roads for tolls, when it shall have acquired from the local authority the equally essential right of occupying with its tracks the particular streets upon which it proposes to conduct its business. That the state did not undertake, in the general incorporation act of May 1, 1852, to confer upon any of the class of corporations therein provided for the power to enter upon and occupy with its tracks the public streets of any city or village, or the public highway of any township or county, before obtaining the consent of the local authority concerned, is too clear for discussion. Section 12 of that act expressly provided how such street or highway rights might be obtained, that section being in these words:"

The section is here omitted. It contains the assertion of the right of a municipal authority to impose terms and conditions upon such grants. The Circuit Court of Appeals then proceeds to say:

> "The right of the local authority to impose terms and conditions is clearly conferred, and no such corporation can impose itself upon the public streets or highways unless it enter into an agreement touching the occupancy of such streets, or resorts to the

right of condemnation in default of an agreement. This right to impose terms and conditions most obviously implies the right to agree upon the duration of such occupancy."

So far, then, as those ordinances of the City of Cleveland are concerned, which though passed prior to the 14th day of May, 1878, contain express limitations as to the duration of the grants made, it is plain that the legislature had, in accordance with the general legislative policy of the State previously and subsequently pursued, endowed the municipal council with full and comprehensive power to enter into contracts with private persons or corporations for the occupation of its streets by street railroads. These powers were as large as the subject matter required, and unlimited except by limitations contained in the statutes themselves. It cannot be supposed that the legislature intended to say, in view of the language it did use, that a municipal council was disabled from making a grant unless it made one in perpetuity, or that attempts by a municipal council to safeguard public interest as it might appear in view of future considerations, were prohibited. The general power was granted. The councils were not told either that it might be exercised by a grant for years or a grant in perpetuity. It was such a power as in its nature was susceptible of continuing, periodical and repeated exercise.

It would hardly be claimed, if the state statute authorized a municipal corporation to make a contract to light the streets of a city, and contained no maximum period for such contract, that a contract made in pursuance of that power for the lighting of the streets of the city with coal oil lamps, either constituted a perpetual obligation forever foreclosing the city from availing itself of improved devices in public lighting, or even a perpetual obligation upon the municipal corporation to deal with that particular contractor, and the situation here affords an exact parallel, for all of the public grants

as to which this contention is made related to the operation of horse railroads, and not to such modern electrical devices as are now operated by the complainant company. If these contracts are perpetual obligations as to their duration, they are likewise perpetual as to the rights conferred by them, and under them the complainant company, upon some streets in the City of Cleveland, would now have the right, and only the right, to operate horse cars of the kind in use prior to 1878 upon single tracks for parts of extensive lines in other parts operated on double tracks by electricity. The fact is that The Cleveland Electric Railway Company does not operate under any of the grants made prior to 1878, but under authority of ordinances made long subsequent thereto, in complete substitution for all of the earlier grants. The suggestions here made, however, seem important for the purpose of showing that the claimed perpetual right must be limited to the perpetual right to do the thing originally authorized, and when so limited, the claim becomes absurd.

Enough has perhaps been said upon those ordinances of the City of Cleveland and of the Village of East Cleveland passed prior to 1878, which did contain specific limitations of time. As to those which contain no such specific limitation, it is to be observed that they were all resolutions or ordinances of the Village of East Cleveland, and all relate to the construction of tracks as a part of either the Euclid Avenue line or the Garden Street line of The East Cleveland Railroad Company.

The original resolution of the City of Cleveland of November 1, 1859 (Record, page 182), under which the first track construction of The East Cleveland Railroad Company was prosecuted, expressly limited the right granted to expire at the end of twenty years from the 20th day of September, 1859. The several resolutions of June 5, 1860, July 3, 1860, and July 31, 1860 (Record, pages 183 to 186), authorize additional tracks subject to the terms of the general street rail-

way ordinance passed September 20, 1859, of which Section 13 provided:

> "No contract under the provisions of this ordinance shall be made for a longer period than twenty years from the date of the passage of this ordinance;" (Record, page 252.)

and from the date of the passage of the ordinance of the 20th of September, 1859, continuously forward to 1878, there was always in force a general ordinance of the City of Cleveland limiting the time of all street railway grants not otherwise limited to the maximum of twenty years, which provision was a general underlying condition of all street railroad contracts made.

On April 11, 1862, The East Cleveland Railroad Company applied to the trustees of East Cleveland Township for authority to extend the Euclid Avenue line from the limits of the City of Cleveland at Willson Avenue, to Doan's Corners. On August 9, 1862, the township trustees granted the application and authorized the construction of a single track horse railway over the route applied for. The written permit contains no time limitation. (Record, page 187.) On August 2, 1870, the council of the Village of East Cleveland, then an incorporated village under the laws of the State, by ordinance authorized the making of a contract with The East Cleveland Railroad Company, permitting it to remove its tracks to the center of Euclid Avenue, and to operate it during the continuance of the company's corporate existence. (Record, page 193.) The contract made pursuant to this ordinance (Record, page 194), recognizes the right granted by the ordinance, but deals chiefly with paving and maintenance of the street and regulation of fares.

By an ordinance passed October 7, 1872, the council of the Village of East Cleveland granted certain individuals the right to construct a railroad in Euclid Avenue easterly from Fairmount Street (Doan's Corners) to the easterly

limits of the village. This grant likewise was for a single track horse railroad, and subsequently became the property of The East Cleveland Railroad Company. This ordinance contained no limitation of time. All of the foregoing resolutions and ordinances dealt with properties of the Euclid Avenue line of The East Cleveland Railroad Company, and had no relation to the Garden Street line. They authorized, in effect, the removal of the track of The East Cleveland Railroad Company's Euclid Avenue line, from the side to the center of the street, and its maintenance as a single track horse railroad from Willson Avenue beyond Fairmount Street to the easterly limits of the Village of East Cleveland.

The ordinances relating to the Garden Street line important in this connection ar[illegible]nance of the Village of East Cleveland of March 30, [illegible]uthorizing the construction of a branch railroad on Ga[illegible]n and other streets in the Village, with subsequent preambles and resolution (Record page 189) containing a specific limitation of twenty years upon the grant made; a resolution of March 25, 1873 (Record page 200), passed by the Council of the City of Cleveland, permitting the laying of a second or double track in Garden Street between Brownell Street and Willson Avenue, without specific limitation of time, but containing this language:

> "Upon condition * * * that they comply in every respect with all ordinances of the city now in force or which may hereafter be enacted for the government and regulation of street railroads;"

and an ordinance of the City of Cleveland, passed May 23, 1876, authorizing an extension of the Garden Street line and limiting the extension so made, to expire twenty years from the said 23rd day of May, 1876, and requiring it to be operated with the Garden Street branch and the main line (Record page 202). These ordinances, with the original Garden Street resolution of the City of Cleveland (Record page 188), which contains an express limitation for twenty years, are all

of the legislation prior to 1878 affecting the Garden Street line. From a consideration of them it appears that so far as the City of Cleveland is concerned, its legislation either contains specific limitations, or in the one instance where such limitation was not contained, the grant was for a second track in Garden Street, between Brownell and Willson, subject to all existing general street railroad ordinances, among which was the provision of the general ordinance of September 20, 1859, limiting all street railroad grants to twenty years, and in the Village of East Cleveland, the original granting ordinance, with the subsequent preamble and resolution, likewise contained a specific date of expiration. Unless, therefore, the Garden Street line being owned by the same company that owned the Euclid Avenue line, was so far a part of the Euclid Avenue line as to be affected by rights in perpetuity existing in behalf of the Euclid Avenue line, there is no basis for contending that any right in Garden Street was unlimited.

The conclusive answer, however, to the claims of The Cleveland Electric Railway Company in this behalf, is as suggested above, the substitution of later grants with fixed and definite periods of expiration for the earlier grants as to which a limitation of time was either uncertain or lacking. Repeatedly as to the Euclid Avenue line, The East Cleveland Railroad Company and its successor, The Cleveland Electric Railway Company, accepted ordinances with definite dates of expiration. One instance will suffice: on the 13th day of July, 1888 (Record page 218), the Council of the City of Cleveland passed an ordinance granting to The East Cleveland Railroad Company the right to construct and operate an electric street railway on Euclid and Cedar Avenues. By the terms of this ordinance the old animal power railroads previously operated by The East Cleveland Railroad Company in Euclid Avenue were substituted alike in motive power, mode of operation, reciprocal obligations between the contracting parties and duration of rights. It is expressly stated that the rights therein

granted shall continue for the period of twenty years from the date of that ordinance, and on the 17th day of July following, The East Cleveland Railroad Company in writing accepted the permission and privileges granted by the ordinance of July 14, and agreed to abide by the provisions and conditions therein contained.

With regard to the Garden Street line a similar situation existed, whatever may have been the character and duration of the rights of the company prior to the 22nd day of March, 1880, on that day the Council of the City of Cleveland passed an ordinance (Record page 208), permitting The East Cleveland Railroad Company to extend the Garden Street branch, and to equip and operate said extension and its Garden Street branch for the period of twenty-five years from and after the date of the passage of the ordinance.

We have in these two instances typical cases for the application of the doctrine announced by this Court in the case of the *City of Cleveland vs. The Cleveland City Railway Company*, 194 U. S., 517. In that case as the Court will recall ordinances had been passed in the year 1879 granting a renewal of franchise to The Kinsman Street Railroad Company, in which the right was reserved to the city subsequently to increase or diminish the rate of fare therein authorized to be charged. By subsequent ordinance, extensions of the Kinsman Street railroad were authorized, and its consolidation with The West Side Street Railroad Company was approved and authorized in an ordinance of February 16, 1885, which fixed the terms and conditions upon which The West Side Street Railroad Company and The Woodland Avenue Street Railway Company, successor to The Kinsman Street Railroad Company, and the tracks of those companies, might be consolidated. This latter ordinance of February 16, 1885, dealt specifically with the question of the rate of fare to be charged upon the lines of the consolidated company, and this Court said:

> "In reason the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time, and no reservation was made of the right to alter; that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time;"

the theory of the Court being plainly that where a contract is made between a municipal corporation and a street railroad company dealing with rates of fare, duration of contract or any other detail, such contract will be deemed in substitution for earlier contracts upon the same matters, and that by the acceptance of the subsequent contract, both parties surrender their right to assert claims, based upon provisions of earlier contracts, inconsistent with the provisions of the latest contract. Whatever may have been the duration of grants for various portions of the Garden Street line of The East Cleveland Railroad prior to March 22, 1880, it is certain that subsequent to that date all outstanding claims and rights were merged in the ordinances then passed; for the parties were competent to deal with the subject matter; they dealt plainly, explicitly and definitely; the one party fixed a date of expiration, and the other accepted and acquiesced therein. And the same is true of the Euclid Avenue line after the passage of the electricity ordinance of July 13, 1888.

The two cases cited in the court below in support of the contention as to grants in perpetuity were *Citizens Railroad Company vs. City Railway Company*, 64 Fed., 647, and the same case, 166 U. S., 557, and the Ohio case of *State ex rel. Taylor vs. Columbus Railway Company*, 24 O. C. C., 609.

In the case of *Citizens Railroad Company vs. City Railway Company*, above cited, the situation was that a general act of the legislature of Indiana authorized the creation of

street railway companies with perpetual corporate existence, and required that before any work was done by such company in the construction of a street railroad, the consent of the common council of the city in which the tracks were to be laid was to be obtained. The City of Indianapolis, in 1864, passed an ordinance authorizing The Citizens Street Railroad Company to lay tracks upon designated streets, and provided that the right to operate the railroad should extend for the period of thirty years. In 1880 the council of Indianapolis amended the original grant so as to read thirty-seven years instead of thirty, and in 1893 the council claimed that the rights of the company would expire in thirty years from 1864, granting to another company called The City Railway Company, the right to lay tracks in a number of the streets then occupied by The Citizens Street Railroad Company. A bill in equity was filed by The Citizens Railroad Company against The City Railway Company, to enjoin it from interrupting or disturbing the Railroad Company in the maintenance and operation of its system, alleging that the latest action of the council sought to impair the contract between the company and the city. In the Circuit Court two judges sat, and it was held that the grant for the period of thirty-seven years was valid, so that at the time the ordinance of 1893 was passed, the city was without right to interfere wih the contract rights of the company. Woods, Circuit Judge, further held that the city had no power, when it gave its original consent in 1864, to limit the time during which the right should be exercised, and that therefore the right was perpetual. From this latter conclusion Judge Baker dissented. The dissenting opinion of Judge Baker points out the distinction drawn by Judge Lurton, in the case of *The Louisville Trust Company vs. City of Cincinnati*, 76 Fed. Rep., 296, between the franchise to be a corporation which is derived by the company from its charter, and the contractual right to occupy public property subsequently acquired by such a company from a municipal corporation. Judge Baker remarks:

> "The right to occupy and use the streets of a city for railroad purposes is a franchise, and is wholly distinct from a franchise to be a corporation, which is derived directly from the state. The latter franchise cannot be sold or conveyed unless express statutory authority is granted for that purpose. The franchise to use the streets for railroad purposes, the right of way on which to build and operate a railroad for profit, is a subject of sale and conveyance.
>
> *Railroad Company vs. Delamore*, 114 U. S., 501."

The case subsequently came in this Court on appeal, and it was held that the circumstances connected with the passage of the amended ordinance of April 7, 1880, were such as to estop the city from denying that the charter was extended to thirty-seven years, but this Court expressly refrained from expressing any opinion as to whether the franchise was perpetual. So that the decree entered by this Court was exactly such a decree as was indicated by Judge Baker in his dissenting opinion in the court below.

The other case referred to, *State ex rel. Taylor vs. Columbus Railway Company*, was tried in the Circuit Court of Franklin County in 1903. The action was in the form of *quo warranto*, to test the right of the railway company to occupy the streets of the City of Columbus, and by answer it was asserted that various grants of rights, franchises and easements made by the state, the City of Columbus and the Board of County Commissioners of Franklin County had been accepted by the companies to which they were made, and large expenditure made under them. Replying to this the plaintiff alleged that the grants were not by their terms in perpetuity, and that if the grants were by their terms intended to be in perpetuity, they were void. An agreed statement of facts was filed which the court said seemed to be an agreement that perpetual franchises in the streets other than Friend Street were granted if

it was within the power of the city to make or authorize a grant of such franchise, and to raise only the question of the existence of the power. The court further says:

> "It appears that the franchises in question were granted after the passage of the first street railway act in 1861, and before the passage of the act of 1878 limiting to twenty-five years the grant of permission to use a street, and that the ordinances are silent as to time, or provide that they shall continue in force during the term of the charter of said company."

On this state of facts it was held that the

> "right to construct and operate a street railroad in streets of the city prior to the act of May 14, 1878, was a franchise or privilege granted by the city upon condition that the city consent to its exercise; that such consent given prior to the act of 1878 without any limitation of time, or to a corporation with succession during the term of its charter, is revocable only by legislative authority. Further, that the franchise or privilege to construct and operate a street railway granted and consented to prior to the act of 1878 without limitation of time is perpetual but subject to be determined by the General Assembly."

A careful examination of the case will show that it does not support the contention made for it by the complainant. As pointed out by Judge Tayler in the court below:

> "This case does not hold that prior to the act of 1878 the council of a municipal corporation was without power to impose a limitation of time on a street railroad franchise. It did hold, and does hold, that until the statute imposed the twenty-five year limitation on the power of the council, a franchise grant without limitation was perpetual in so far as the power of the council existed to terminate it."

And as further pointed out by Judge Tayler, the opinion of the Circuit Court resists the contention there made similar to

the one made here, Judge Tayler concluding:

> "It therefore appears to have been recognized and held in this case that if prior to the act of 1878 the council had seen fit to impose a time limitation on the franchise, such limitation would have been valid."

The most, therefore, that can be contended from this case is that upon a confused record, where the court was obliged to complain in its opinion that it could not come at the ordinances referred to by counsel in their arguments, it was held that a grant prior to 1878 containing no limitation and not surrendered by the acceptance of the grant made subsequent to that time containing a specific limitation, was in perpetuity —a situation so remote from the one here presented as to afford no parallel.

In the court below, the city urged upon the attention of the court the record in the case of *State ex rel. Hadden vs. East Cleveland Railroad Company*, 6 O. C. C., 318, as adjudicating the claim of a perpetual right adversely to The Cleveland Electric Railway Company. This Court has twice examined the case of *State ex rel. Hadden vs. East Cleveland Railroad Company*, and will recall that it was an action in *quo warranto*, brought by the prosecuting attorney against The East Cleveland Railroad Company to oust it from exercising the privilege and right of maintaining a street railway in Garden Street, between Brownell Street on the west, and Willson Avenue on the east. It was asserted as a ground for this action that the ordinance of January 14, 1868, conferred upon The East Cleveland Railroad Company the right to operate its track for the period of twenty years from that date, and that on the 22nd day of March, A. D. 1880, the council had passed an ordinance authorizing the extension of the Garden Street line, and renewing the grant for the whole line to the 22nd day of March, 1905. The action was brought, it will be observed, subsequent to the expiration of the twenty

years from the 14th day of January, 1868, and the contention was that it was incompetent for the council of the City of Cleveland to renew the grant prior to its expiration, the language of the statue authorizing renewals being that the council may renew a grant at its expiration. It was therefore contended that the ordinance of the 22nd day of March, 1880, was invalid. The Circuit Court sustained a demurrer to this petition, expressing as its opinion that a grant might be renewed prior to its expiration; that the grant to The East Cleveland Railroad Company for its Garden Street line had been so renewed, so holding that The East Cleveland Railroad's Garden Street line had been prolonged as to the duration of its grant to the 22nd day of March, 1905. Judge Tayler thought that there was force in the contention made by the city with regard to the effect of this case, but that it was not convincing, and summed up by saying:

> "The conclusion, therefore, to which I have come in respect to this claim of perpetual or unlimited franchise, is that prior to the act of 1878 the council had the right to limit the term of the franchise, and that as to any franchise granted for an unlimited period, the rights of the complainant have been wiped out by its subsequent contracts entered into with the city,"

a conclusion, we respectfully submit, in entire harmony with all the authorities, and following the decisions of this Court in the cases of *The City of Cleveland vs. Cleveland City Railway Company*, above cited.

THE CLAIM THAT THE RIGHT TO OPERATE THE GARDEN STREET LINE WAS PROLONGED TO JULY 13, 1913.

This contention derives whatever strength it has from the theory that the Euclid Avenue line and the Garden Street line of The East Cleveland Railroad Company were so far parts of the same line that the ultimate fixing of the expiration

of the grant for the Euclid Avenue line at July 13, 1913, inevitably carried the Garden Street line with it to that date—a theory wholly inconsistent with the facts, when it is recalled, as above recited, that at the time the first Garden Street grant was made by the City of Cleveland, January 14, 1868, there was no statute which authorized the extension of an existing street railroad. Moreover, no attempt was made by the City of Cleveland to extend an existing street railroad. The resolution of January 14, 1868, recites (Record page 188) that advertisement for bids had been made for the right to carry passengers upon the proposed Garden Street railroad, and that the grant was made to The East Cleveland Railroad Company because it was the lowest and best bidder. That was the statutory requirement. If any other railroad company or individual had been a better or lower bidder, pursuant to that advertisement, the council would have made the grant to it, and if the grant had been made to another than The East Cleveland Railroad Company, and had been kept distinct in ownership from the Euclid Avenue line throughout its subsequent history, there could manifestly have been no contention that there was any such relationship between them as to endow them of necessity with a common length of life. Throughout the entire legislative history of the City of Cleveland, from the time that the Garden Street line was first authorized, to the present, there is a complete preservation of the separate and distinct identity of these two lines of railroad Both the city and the owning and operating company have continued from the beginning to treat these lines as separate and distinct. This appears, among others, in the following ways:

1. In the petition of The East Cleveland Railroad Company to the council of the City of Cleveland (Record page 203), wherein *a renewal of the Euclid Avenue line* is asked.

2. In the ordinance of September 15, 1879 (Record page 204), granting a renewal of franchise to The East Cleve-

land Railroad Company to construct, maintain and operate its railroad in and through *certain streets* of the City of Cleveland, which streets appear in the body of the ordinance to be those which comprise *the Euclid Avenue line alone.*

3. The ordinance of March 22, 1880 (Record page 208), permitting an extension of the Garden Street branch, and authorizing the operation of the extension and the Garden Street branch as entirely distinguished and separate from the Euclid Avenue line, for the period of twenty-five years from that date.

4. The ordinance of April 4, 1883 (Record page 209), authorizing the operation of a double track in Euclid Avenue from the west line of Willson Avenue to Fairmount Street, which in express terms grants the right to operate the Euclid Avenue line east of Willson to the 20th day of September, 1904, and recites that that is the day to which the right to operate the Euclid line west of Willson exists, and this ordinance was subsequent to the time when the right to operate the Garden Street line had been prolonged to March 22, 1905.

5. The ordinance of March 15, 1886 (Record page 212), authorizing The East Cleveland Railroad Company to extend and operate its double track in Euclid Avenue east of Fairmount Street, again limiting the extension to expire on the 20th day of September, 1904, with the rest of the Euclid grant.

6. The ordinance of July 16, 1886 (Record page 214), granting to The East Cleveland Railroad Company and The Brooklyn Street Railroad Company authority to extend their tracks in the central portion of the town, and limiting the grant to expire as to each company with its main grant respectively.

7. The ordinance of July 18, 1887, in which authority is given to The East Cleveland Railroad Company to extend the Garden Street branch and to operate the extension in con-

nection with both the Garden Street branch and the main line, but limiting the extension to expire with the grant for the "Garden Street main line" as distinguished from the "Euclid Avenue line." (Record page 217.)

8. The ordinance of July 13, 1888 (Record page 219), authorizing the installation of electric traction on the Euclid and Cedar lines, granting a specific renewal for twenty-five years from that date in the following language:

> "Shall be in force for the period of twenty-five years from and after the date of the passage of this ordinance *upon its main and Cedar Avenue lines*"

excluding any reference to the Garden Street line.

9. The ordinance of March 10, 1890, authorizing the substitution of electric motive power on the Garden Street line (Record page 225), the grant being

> "To operate by electric power the said Garden Street branch during the term of its *present grant for said Garden Street branch.*"

10. The ordinance of April 12, 1888 (Record page 269), authorizing The East Cleveland Railroad Company to extend the Euclid Avenue line through Case, Perkins, Willson, Hough, Dunham and Wade Park, and to operate the extension by electricity during the term of

> "the present grant for said East Cleveland Railroad Company's main line."

The only two ordinances of the City of Cleveland which appear in any way inconsistent with this otherwise uniform practice of preserving a complete separation between the Euclid and Garden Street lines owned by The East Cleveland Railroad Company, are the ordinances of March 30th, 1891 (Record page 227), which authorizes The East Cleveland Railroad Company to construct a second or additional track upon Central Avenue from the east line of Willson Avenue to the right-of-way of the Cleveland and Pittsburgh Railroad

Company, and provides:

> "The right herein granted shall be valid until the expiration of the grants for the said company's main line;"

and the ordinance passed less than a month later, April 20, 1891 (Record page 228), authorizing The East Cleveland Railroad Company to lay an additional or second track in Quincy Street, and saying:

> "The right herein granted shall be valid until the expiration of the grants for said company's tracks on said Quincy Street, east of Lincoln Avenue, to-wit July 13, 1913."

As to the first of these ordinances, it is plain that the council meant the Garden Street line. It had previously used that term in the ordinance of June 18, 1887 (Record page 217), and the thing which the council was doing was to authorize the laying of a second or additional track to facilitate the operation of tracks already laid. It was immediately merged in and became part of the railroad at that point, and what the council plainly had in its mind was the main line which was then being extended. As to the ordinance of April 20, 1891, Judge Tayler said (Record page 81):

> "Respecting the ordinance of April 20, 1891, granting to The East Cleveland Railroad Company permission to lay an additional, or second, track in Quincy Street, from New Street to Woodland Hills Avenue, and wherein it is provided that the right therein granted shall be 'valid until the expiration of the grant for said company's tracks in Quincy Street east of Lincoln Avenue, to-wit, July 13, 1913,' the conclusive answer is that the grant for the company's tracks in Quincy Street east of Lincoln Avenue did not, and would not, expire July 13, 1913. The ordinance did not state the fact. It is true that the original right in Quincy Street east of Lincoln Avenue was, by the terms of the ordinance granting it, to expire with the main line franchise. If by 'main line' was meant the Euclid Avenue line, then

it would expire in 1904. Subsequently, that main line franchise was extended to July 13, 1913, and doubtless the person who drafted this ordinance assumed that, as the main line franchise had been extended to July, 1913, the effect of that extension was to extend the time of the rights in Quincy Street east of Lincoln Avenue to that date. But the fatal defect in that process of reasoning, and the fatal objection to the date inserted in the ordinance of April 20, 1890, is that, after the passage of the ordinance for the Quincy Street extension east of Lincoln Avenue, and before the passage of the ordinance extending the main line to 1913, to-wit, on March 10, 1890, the council passed an ordinance authorizing The East Cleveland Railroad Company to substitute electrical motive power for horse power over its Garden Street line to Woodland Hills Avenue, and provided that the right to operate the Garden Street branch should continue during the term of the company's then present grant for the operation of the tracks upon the Garden Street branch.

Nor, the Garden Street franchise, at the time of the passage of the ordinance of March 10, 1890, was to expire on the twenty-second day of March, 1905, and the period of expiration of the right to operate an extension east of Lincoln Avenue on Quincy Street, if it could be different from the life of the main stem, if it could be made to co-exist with the franchise on the Euclid Avenue line, was wholly wiped out by this new ordinance authorizing the use of electricity, and changed the termination of its franchise to accord with the franchise for the Garden Street line, viz., March 22, 1905."

The ordinance to which Judge Tayler refers appears in the record at page 225. Nothing can be added to the conclusiveness of the observations made by Judge Tayler in reply to this contention. It is manifest that not only have both the Council of the City of Cleveland and the owning company, preserved the separate and distinct identity of the Garden Street

line from the earliest times, but that the language and the plain intent of the ordinances passed by the Council and accepted by the company are susceptible of no other interpretation than that the Garden Street line, in its entirety, and as a unit, was limited to expire on the 22nd day of March, 1905, and that all conflicting and outstanding claims were surrendered by the company and merged in its final contract and agreement.

It is possible that something may be contended in this connection for the resolution of the 29th day of May, 1893 (Record page 23). This is a resolution assenting to the consolidation by which The Cleveland Electric Railway Company was originally formed. We reserve our analysis of this resolution until we come to discuss the claim made as to the growth and creation of the system by the complainant, but here point out that this resolution was passed not as an attempt on the part of the Council to force any concessions from the newly organized consolidated company, nor even pursuant to any application from it for any enlargement of its privileges. On the 22nd day of May, 1893, the new company addressed a communication to the Council, informing it that the two consolidations by which the new company was formed, had already taken place; that they were made under advice of counsel, and were believed in all respects to be legal and valid; that the only purpose of sending any communication was to quiet any apprehension which might exist in the public mind as to the intention of the company, and that it therefore desired to enter a distinct and emphatic disclaimer that the company sought to enjoy, or claimed to have any greater rights by reason of the consolidation than originally inhered in the constituent companies. The communication further informs the Council that the consolidated company is already established and has in practice a system of transfers, and that it proposes to establish through lines for the better accommodation of its patrons, all of which, the Court will observe, is a

mere notice to the Council of a completed transaction. The consolidation had taken place, the transfers were then in use, through lines were in contemplation, and the company predicated no request for prolonged grants upon these acts on its part. The subsequent resolution of the Council is very brief, and simply states what the law already required as to rates of fare upon extended and consolidated lines, and what the company had already informed the Council that it had voluntarily done by way of transfers. The subject matter of the life of the grants of the constituent companies was not referred to in either the communication to the Council, or in the Council's resolution, but on the contrary, the company informed the Council that it claimed no prolongation of any grant by its consolidation, and by not asking for any such prolongation, it acquiesced in the treatment of that subject matter as one not then necessary to be acted upon.

It will be recalled that the lines constituting the consolidated company were operated under grants expiring variously from 1908 to 1914. This fact was of course known to the company, and it would seem that question had arisen—perhaps public apprehension as to whether the voluntary consolidation of these companies might not in some manner enlarge their rights. The action of the company in disclaiming any such purpose disarmed the public and the Council, and this communication, together with the subsequent acceptance by the company of the resolution of May 29, 1893, constitute an agreement between the Council and the company that at that time the company was receiving no addition to the rights previously obtained by the constituent companies of which it was composed.

The foregoing argument is addressed in detail to the interpretation of the various ordinances passed by the Council of the City of Cleveland, out of which it is contended by the complainant that the extension of the Garden Street line to

July 13, 1913, is to be inferred and the conclusion reached is that no such inference is justified, either by the language used to the Council or by the intention to be gathered from the aggregate effect of its acts. Upon this whole subject in our opinion nothing can be said that will add to the conclusiveness of the reasoning of Judge Tayler in the court below. After having disposed of these ordinances in detail the Trial Judge proceeded to inquire into the theory upon which extensions are authorized to be made and the nature and character of an extension when made. No useful purpose can be served by a re-statement here of the vigorous and convincing argument contained in the opinion on this question. We respectfully ask the Court to consider that opinion as a part of this brief. Record pages 76 to 87 and especially beginning at page 80.

The conclusions reached by Judge Tayler are that the Statutes of Ohio, at the time the Garden Street branch was originally constructed, contained no authority, to municipal councils to authorize extensions, and since the legislative proceedings incident to the inauguration of that enterprise show it to have been an original and independent street railroad grant, the Garden Street line cannot be considered in its origin an extension of the Euclid Avenue line of The East Cleveland Railroad Company; that the power to make extensions conferred in its original form by the act of May 7th, 1869, authorizes the extension of an existing track as a mere incident to and enlargement of an original enterprise and that the act does not constitute a donation of power to be used as an alternative method of establishing an independent street railroad without the formalities and safeguards provided by Sections 2501 and 2502 of the Revised Statutes; that such an extension being a mere incident of an existing street railroad must of necessity have the same life as the thing to which it is appurtenant and that whatever attempts municipal councils may have made to limit the life of an extension to expire a different date from that of the line extended, such an effort would

be vain; that, therefore, the Garden Street line having been in itself originally an independent, separate and distinct railroad, the extensions to it become a part of it, limited to expire of necessity at the same time and that the renewal ordinance of March 22, 1880, necessarily covered both the original Garden Street grant and all its extensions and was inconsistent with any claim that portions of that grant, granted by way of extension should have a different date of expiration.

THE ORDINANCE OF FEBRUARY 9TH, 1894, CREATING THE WILLSON AVENUE CROSS-TOWN LINE.

The contentions with regard to the effect of this ordinance are made in paragraph 24 of the amended bill of complaint. (Record, page 123.)

They may be summarized as follows:

1. That the ordinance by its terms *required* the complainant to construct a portion of the cross-town railroad in Willson Avenue, the other portion to be constructed by The Cleveland City Railway Company and to operate cars thereon under the control and regulation of the Council.

2. That Section 6 of the ordinance provided that passengers on any car operated on any part of Willson Avenue upon the payment of one fare should be entitled to be transferred to any other line of either of the constructing companies, with the additional right of transfer from such second line to a car on any other line of the company, operating the same crossing the Cuyahoga River, and further providing that passengers on any line of either of the said companies intersecting or coming to Willson Avenue should be entitled to a transfer to Willson Avenue and a continuous ride thereon without additional payment of fare.

3. That Section 7 of the ordinance requires the paving of the tracks and the space between the tracks and one foot

outside of each outer rail, and also requires the company to widen the roadway of Willson Avenue between Euclid Avenue and Scovill Avenue five feet on each side.

4. That by its terms said grant is stated to be in force until the first of July, 1914. It is then stated that at the time this ordinance was passed The Cleveland Electric Railway Company was operating various lines, as to some of which the date of expiration was the first day of July, 1914, and further that the Garden Street line intersects Willson Avenue.

From these considerations it is deducted that even if the various grants of The Cleveland Electric Railway Company and The Cleveland City Railway Company did not at the time of the passage of this ordinance continue until the first day of July, 1914, then the effect of this ordinance was to prolong grants earlier expiring, for the reason that it would be impossible for the two companies to carry out the provision as to transfers contained in Section 6, unless they were permitted to continue the operation of all intersecting and connecting lines to that date, and that therefore "The Council recognized the fact that your orator's right to operate therein (Central Avenue) did not expire prior to July 1, 1914."

In examining this contention it must be borne in mind that the Willson Avenue Cross-town line was built under authority of Section 2505, Revised Statutes of Ohio, which says:

> "That council of any city or village may grant permission by ordinance to any corporation, individual or company owning or having the right to construct any street railroad to extend their tracks, subject to the provisions of Sections 3437, 3438, 3439, 3440, 3441, 3442 and 3443 on any street or streets where the Council may deem such extension beneficial to the public, and when any such extension is made the charge for carrying passengers on any street railroad so extended and its connections made with any other road or roads by consolidation under

existing lines shall not be increased by reason of such extension or consolidation."

In other words the Willson Avenue road was constructed not as an original grant to the person or corporation that would agree to carry passengers thereon at the lowest rate of fare, the person being ascertained as the result of competitive bidding, but was a mere extension of the tracks previously authorized to be constructed by grants made under favor of Sections 2501 and 2502 R. S. containing definite and fixed limitations as to their duration.

As we have before indicated, the tracks authorized to be extended were in part owned by one company and in part by the other. The Cleveland Electric Railway Company owned tracks in Willson Avenue at the intersection of Scovill Avenue limited to expire on the 26th day of January, 1910; it also owned tracks in Willson Avenue at the corner of Perkins Avenue limited to expire July 13, 1913, as a part of its Euclid Avenue line. The Cleveland City Railway Company owned tracks in Willson Avenue at the intersection of Hough Avenue, then limited to expire the 26th day of January, 1910, and the tracks at the intersection of Woodland Avenue and Willson Avenue, then limited to expire, as this Court has determined, in 1908.

An examination of this Willson Ave Cross-town ordinance (Record page 235), and the acceptance thereof, (Record page 238), shows that by the title of the ordinance it was not to be distinguished from any other mere extension ordinance, the language of the title being "An ordinance granting permission to The Cleveland Electric Railway Company and The Cleveland City Railway Company to extend their tracks in Willson Avenue." The first section of the ordinance is confined to a description of the tracks authorized to be constructed and the purpose of such construction, which is stated to be,

"Such extensions to be constructed, main-

tained and operated in connection with the existing tracks in said Willson Avenue as a double track street railroad, with the necessary poles and overhead wires and to be operated by means of electricity as a motive power upon the following terms and conditions."

The complainant repeatedly refers to ordinances of the City of Cleveland as *requiring* and *compelling* the street railroad companies to do various things and in this instance the bill of complaint describes the Willson Avenue Cross-town Line as *requiring* The Cleveland Electric Railway Company to build these tracks and operate them, the inference being that a hardship was thus placed upon the company. The uniform language of all the ordinances in this regard is that permission is granted by the Council and in this Willson Avenue ordinance the Court will observe that in the title and in the granting clause in Section 1, the thing that the Council describes itself as doing is granting a privilege and not imposing a burden. It is to be further noted that the exact privilege as described by the Council was the right to construct these tracks in the streets described and to operate them in connection with the existing tracks in Willson Avenue as a double-track street railroad. This language of description is not patient of a construction which would extend it to include all the other lines owned by both companies in the City of Cleveland at that time.

In Section 2 the Council reserves the right to regulate the mode and manner of use of the tracks proposed to be constructed so as to afford each company such rights thereon as the Council deems just in the event of disagreement between the two constructing companies.

In Section 3 the Council reserves the right to suspend the running of cars on any part of said extensions in the discretion of the Board of Control for such period as may be necessary on account of the construction of public im-

provements in the streets. This again shows that the Council was not dealing with a general renewal of all existing and outstanding street railway grants, for the need of reservation here would have been of supreme importance, to be applied generally to all tracks which were subsequently to be operated under authority of this ordinance. The Council, however, plainly is imposing conditions upon the operation of the extended tracks only and not upon the operation of intersecting or connecting lines.

Section 5 regulates the mode and manner of the operation of cars in Willson Avenue requiring that cars be stopped at all street intersections at which persons may desire to enter or leave the same; that night cars shall be operated between given hours; that specified kinds of motor and cars shall be used in Willson Avenue; that a specified weight and pattern of rail shall be laid therein and that the companies shall be required to sprinkle between the outer rails of their tracks on said Willson Avenue over a given space in a manner satisfactory to the Director of Public Works. All the details of operation dealt with in this section were ordinary and necessary to be incorporated in any street railway grant. If it had been intended that this ordinance should be in substitution for or prolongation of the grants upon connecting and intersecting lines these terms would have been made to apply to all the lines operated by both companies; cars upon them would have been required to be stopped at street intersections to receive passengers; schedules for the operation of cars upon such intrsecting and connecting lines would have been provided, the mode of constructing and maintaining track in other streets upon which intersecting and connecting lines were operated would have been operated.

Section 7 contains provisions similar to those in Section 5 regulating the mode of constructing the tracks, the amount of paving required to be done, the character of the paving, limiting it in each case to apply only to those parts

of Willson Avenue over which track extension is by this ordinance authorized.

Section 8 provides that the companies shall widen Willson Avenue between Euclid Avenue and Scovill Avenue and bear certain expenses apparently rendered necessary by the installation of a double-track railroad in the street, but contains no reference of any sort direct or indirect to any other line of cars operated by their company.

Section 9 provides that the company shall comply with and perform all of the general ordinances of the city relating to street railroads now or hereafter in force, being apparently intended to bring the Willson Avenue extension grant under the same police regulations as had previously been enacted to apply to the other lines owned by the company.

Section 10 is exceedingly brief. It says: "This grant shall be in force until the first day of July, 1914." This would have been the place for the Council to insert, if it had intended it, language which would have prolonged the right to continue the operation of intersecting lines.

Section 11 provides the formalities of acceptance of the ordinance.

Section 12 is exceedingly significant. It provides that the failure or refusal of either of the companies at any time to comply with and perform all and singular the terms and conditions of this ordinance applicable to such company or the general ordinances of the city relating to street railroads now or hereafter in force shall work a forfeiture *of this grant* as to such companies so in default and the rights and privileges thereby granted to the same shall become null and void upon the passage of an ordinance by the Council to that effect.

Such are the provisions of this ordinance. It was accepted by The Cleveland City Railway Company as a mere

ordinance authorizing the construction of street railway tracks in Willson Avenue and accepted generally by The Cleveland Electric Railway Company, neither company indicating in the slightest manner any claim on their part that the ordinance had any relation to the operation of their other lines.

If this ordinance was really an ordinance to renew all outstanding grants, all intersecting and connecting lines, then what shall be said of Section 12 above referred to? It is contended by counsel for the complainant that this ordinance imposed serious burdens upon the two companies, that they were by it required to construct a street railroad as a cross-town line and to exchange passengers by transfers both from intersecting lines to the cross-town line and to lines of one another; the inference sought to be impressed upon the Court being that this ordinance was passed *in invitum*, that it imposed grievous burdens upon these two companies, that it was undertaken by them almost against their will, and yet under the plain terms of Section 12, if either of the companies desires now or has desired at any time from their acceptance of this grant to avoid all these burdens and obligations, the remedy lies in a refusal to perform them, for Section 12 provides that the failure or refusal of either company to abide by the conditions under which the Willson Avenue grant was made, shall work a forfeiture as to that company only of its rights in Willson Avenue and not that it shall have any effect upon their continued operation of outstanding grants.

Suppose The Cleveland Electric Railway Company were to refuse to transfer passengers as required by Section 6 of this ordinance, and in a *quo warranto* proceeding the question were raised of the effect of this refusal upon their rights in all the streets, constituting as they say, 236 miles of tracks of the City of Cleveland, can it be conceived that any court would say that the language of Section 12 imposed upon that

company a forfeiture of all of its rights in all the streets for such refusal, when the language of the section itself is that such refusal shall work a forfeiture *of this grant.* It is plain that in such a case a court would decree an ouster of the privileges conferred by this ordinance and The Cleveland Electric Railway Company would be ousted from the possession of such portions of Willson Avenue as were occupied under its terms, but the right to operate its lines upon intersecting streets would manifestly be left unaffected by such a judgment.

With regard to Section 6 of the ordinance, being the section which requires the reciprocal transfer of passengers, it is to be noted that transfers are not recognized by the statutes of the state, there being no statute relating to that subject. It is further especialy to be noticed that transfers first come into the street railway legislation of the City of Cleveland on the initiative of the complainant. Less than a year before the passage of the Willson Avenue grant the complainant company had become a consolidated company, making its consolidation by advice of counsel and without any application to the authorities of the City of Cleveland. The first consolidation took place on the 25th day of March, the second on the 24th day of April, 1893,and about a month later, May 22, 1893, the company informed the Council that it had since its consolidaton had been effected,

> "issued transfer checks to all persons desiring them to enable such persons to have a continuous ride over any East Side line to any South or West Side line of the company to any East Side line for one fare, and will continue such system of transfers where it cannot better accommodate its patrons by such other lines as it may establish. That it disclaims all intention of charging more than one fare for any such continuous ride."

As we have shown above, when that communication was sent to the Council The Cleveland Electric Railway

Company did not deem its issuance of transfers a consideration upon which it could properly base a request for a prolongation of grants, but rather the just inference is that such transfers were beneficial to the business of the company, and so when the Willson Avenue grant came to be passed, the inclusion of the old transfer system which had been originally established by The Cleveland Electric Railway Company voluntarily and for the benefit of its own business, was not treated as a burden upon the grantee of such a character as to require or justify the consideration of the length of the life of its outstanding grants.

Indeed the contention of the statute law of the state at the time the consolidation of 1893 and Willson Avenue extension of 1894 were authorized was such that no increased fare for a continuous ride could be authorized by reason of any such consolidation or extension. (See Section 2505 R. S. cited above.) The Court will recall that the thing the Council was doing was to extend existing tracks and that the law required that upon such extensions no increased fare might be charged. The effect of Section 6 therefore was only to write into this ordinance what the law of the state already required *plus* what the policy of the company had already determined to be for its own interest.

Apply to this Willson Avenue Cross-Town Line the tests of public policy proposed by Mr. Justice Gray in the case of *The Central Transportation Company vs. Pullman Palace Car Company*, 139 U. S., 24, assume that this grant was made at the solicitation of these grantees and that it was drawn up by them or their agents and that the words used are their words, can it be supposed that the grantees were unaware of the date of the expiration of their various grants, or that the extension of life upon their outstanding grants, from four to six years, was a thing so slight that it escaped their recollection, or was deemed by them so unimportant an incident that no language was needed to convey

that right to them from the public? The rule of law, as we have discovered, holds them at their peril to state explicitly the thing they seek to secure from the municipal corporation and estops them from subsequently claiming more than they express in their language in the grant. At the time this Willson Avenue grant was made the Council was not asked to extend the life of the grants of The Cleveland City Railway Company for from four to six years, nor the life of some of the grants of The Cleveland Electric Railway Company for four years—that subject was not addressed to it—it was not considered—it is not spoken of in the ordinance and no equitable consideration is presented which can for a moment stand in the way of an application of the doctrine which this Court has so firmly established, that as against the government no inference will prevail to secure or prolong a private right in derogation of the public right. An attempt is made to present such an equity by the requirements of Sections 5 and 7 of the ordinance requiring the paving of the streets and the maintenance and sprinkling of the paving, and the requirements of Section 8, which imposed upon the company as a part consideration for the privileges granted, the widening of a portion of Willson Avenue, but all the requirements imposed as to the operation of cars in Section 5 were police regulations which the City of Cleveland now has the right to superimpose upon outstanding grants. This is true likewise of the laying of the girder rails and the weight of the rail, if those things be essential to the safe and convenient operation of cars in the street and the requirements as to paving contained in this ordinance were already imposed by the state law and by general ordinances of the City of Cleveland to which this grant was made subject in express terms.

Again about four months after the passage and acceptance of this Willson Avenue grant the Council of the City of Cleveland passed the ordinance of June 25, 1894. Record

page 239, being an ordinance to authorize an extension of tracks in Quincy Street from New Street to Willson Avenue, and here the Council made the right granted specifically to "terminate with the grant for said company's present line in Quincy Street." If the Council four months before had prolonged the Quincy Street grant to expire with the grant in Willson Avenue and these tracks were to connect with the Willson Avenue tracks, why was the language used, "Grant for said company's present line in Quincy Street?"

It is plain further that the Willson Avenue ordinance was an extension, the right to construct which was granted to two companies, the construction to be made from four pieces of track already in parts of the street. It was to be independently operated as a cross-town railroad, all the conditions imposed by statute and ordinance as to pavement and maintenance were imposed upon the construction and operation of this line. The voluntarily assumed obligation as to transfers, which apparently was a part of the policy of the complainant company and as apparently a part of the proposition made by it to the Council in its application for the right to construct this railroad, was sanctioned as applicable to it when constructed.

It is equally apparent that no language contained in the Willson Avenue ordinance extends any intersecting or connecting grant and that no obligation therein contained works any such extension.

The contention which Counsel make that the complainant will be unable to perform the obligations imposed upon it by the Willson Avenue ordinance, if the rights upon their intersecting lines expire at an earlier date and that therefore the intersecting lines must of necessity be extended, is inconsistent with their contention that the Willson Avenue grant was a burden thrust upon them for the public benefit, for the Willson avenue grant itself, as we have shown, provides the escape from that burden.

The subject-matter under consideration in this ordinance was Willson Avenue, not the systems of two street railroad companies covering a great city. The matter of a general prolongation of the life of two great systems was too large and important to be carried in a dark pocket through such an ordinance as this.

As this Court said in the case of *Blair vs. Chicago*, 201 U. S., 400,

> "One asserting private rights in public property under grants of franchises must show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied. Legislative grants of franchises which are in any way ambiguous as to whether granted for a longer or shorter time are to be construed strictly against the grantee."

THE SYSTEM OF THE CLEVELAND ELECTRIC RAILWAY COMPANY.

The contention of complainant's counsel in this connection is difficult to gather. It appears by inuendo and inference through the entire bill as originally filed, and in its amended form. The amended bill (Record page 189) describes the complainant as a consolidation company, and proceeds to show the steps by which it acquired the rights it claims, first calling attention to the original consolidations of 1893 and later to its acquisition by purchase of the rights, privileges and franchises of The Cleveland City Railway Company. In paragraph 26 of the amended bill (Record page 125) an account is given of street railroad conditions in Cleveland prior to the several consolidations and purchases under which all of the street railroad lines came to be operated by one company. It is said, for instance, that prior to the 29th day of May, 1893, the various lines which formed the consolidated company were operated independently with-

out transfers, and that *thereupon* the Council of the City of Cleveland, by legislative enactment prescribed the terms and conditions upon which the various companies might be consolidated into The Cleveland Electric Railway Company and consented to the consolidation upon the condition that thereafter all of said lines might be operated as one system, and upon the further condition that only one fare should be charged for a continuous ride, and upon the further condition that transfers should be issued. It is then stated that the complainant accepted those terms and conditions, and agreed to perform them, and that since the consolidation, the complainant has operated all these lines as one system, so that the several constituent lines have lost their identity. How far this statement is from a fair and frank narrative of the facts, is made perfectly plain by reading page 230 of the record, for it there appears that the consolidation of the several lines into The Cleveland Electric Railway Company, the installation of through lines, and the issuance of transfers was the voluntary act of the complainant company, thoroughly established and in existence before it was called to the Council's attention by a communication from the complainant company itself. The suggestion is equally refuted by reference to every ordinance in the record passed subsequent to the 29th day of May, 1893, for an inspection of any one of them will show that the Council thereafter did not deal with the complainant company as one street railroad, but as a company owning many street railroads, and extensions of various lengths were authorized to be made to the tracks owned by it, each limited to expire on the date previously fixed by the Council for the expiration of the particular line then authorized to be extended.

And so in paragraph 27 of the complainant's bill (Record page 126), it is asserted that on or about the 1st day of July, 1903, the complainant company acquired by purchase all and singular the railroad tracks, property rights and fran-

chises of The Cleveland City Railway Company which was then operating various lines of railroad in competition with the lines then owned by the complainant, and that by virtue of its acquisition of said lines, the complainant has been required to establish additional through lines, and through car service, so that there has resulted a complete merger of the property formerly owned by The Cleveland City Railway Co. into that formerly owned severally by The Cleveland Electric Railway Company, making a system aggregating two hundred and thirty-six miles, no part of which can be separated from the aggregate, and no part of which has been, it is claimed, treated separately by the Council. This claim, as stated, is disingenuous. The Court might reasonably infer from the statements made in the bill that the acquisition by purchase of the property of The Cleveland City Railway Company had been made with the acquiescence of the Council of the City of Cleveland, and that the Council of the City of Cleveland had required the establishment of additional through lines, and had taken some action which gave its consent to a merger of all this property into a system, over the separate parts of which the Council surrendered control. It is true the bill does not state that the Council took any such action, and, of course, if the Council had taken any such action, it would be in the record; but the fact is that the acquisition by purchase was made under authority of Section 2505-a of the Revised Statutes, which authorizes any corporation or company organized for street railroad purposes, to lease or purchase any street railroad or street railroads or railroad property operating as a street railroad, with all of the different franchises, rights and privileges, and provides the method in which such purchase may be made, and further expressly prohibits increase in the rate of fare charged for one continuous ride in the same general direction over all such purchased line when operated in conjunction with the lines of the purchasing company. This purchase was made

under favor of that statute, and so far as this record is concerned, the Council of the City of Cleveland has never been informed that the purchase has been made.

The constitution of Ohio prohibits the creation of corporations by special act, and since the adoption of the present constitution in 1851, the legislative policy of the state has been to provide by general laws for the incorporation of street railroad companies, providing their corporate powers, but, as we have shown above, remitting all such corporations to the local authorities for any rights they may desire in the public highways, and empowering such local authorities, as this Court has held, comprehensively to enter into contracts with such companies for the occupancy of the highways. Section 2505-a therefore authorized The Cleveland Electric Railway Company to purchase the railroad of The Cleveland City Railway Company, and expressly authorized it to acquire by such purchase the franchises and rights of The Cleveland City Railway Company. If it had been intended by the legislature that when one company acquired the property of another, the acquired property should be operated under the franchises already owned by the acquiring company, the legislature would have said so in the first place, and in the second place it would not have specifically provided that the franchises of the purchased property should go with the property. It is plain, therefore, that by the purchase of 1903, the complainant company acquired no rights or franchises which had not been previously possessed by the company from which it made the purchase.

In Section 27 of the amended bill (Record, page 126) it is said:

> "And the Garden Street extension is not now, and has not been since its acquisition of 1893, treated by your orator or the City Council or the public as having any identity separate and distinct from, but is and has been since said consolidation,

> treated as an integral part of the entire system of road in operation by your orator, and that were your orator to be now deprived of the right to operate the tracks or any substantial part thereof built in Garden Street as an extension of the original main line of The East Cleveland Railroad Company, it would be impracticable for it to continue to operate the general system with through car service and at one fare, with transfers, which it is now conducting over such entire system, so established as hereinbefore set forth."

This, perhaps, is the best statement of the system claim and of the inference sought to be drawn from it to be found in the bill. There is, however, not a statement made in the extract quoted which is consistent with the facts. The first statement made is that the Garden Street branch, since its acquisition in 1893, has been treated by the complainant and the Council as a part of the system and not as having a separate and distinct identity. That this is not true is shown by the ordinance of June 25, 1894, which authorized an extension of the Garden Street branch and limited the life of the extension to the life of the then existing grants in Quincy Street (Record page 239). This ordinance was accepted by the complainant company, so that both the Council and the company concurred in treating the Garden Street branch as a separate and distinct entity more than a year after its acquisition by the consolidated company. The second statement contained in the portion of the bill above quoted is that the Garden Street branch was built as an extension of the original main line of The East Cleveland Railroad Company. That this is not true, has been abundantly shown above, both for the reason that at the time it was built the statutes did not authorize the extension of existing lines, and also that the original Garden Street tracks were original grants made upon competitive bidding to ascertain the person who would carry passengers at the lowest rate of fare, and had nothing in common with the procedure by which extensions came subsequently to be

authorized. The third statement in the paragraph quoted is that it would be impracticable for the complainant to operate the general system with through car service, and at one fare, with transfers, if its right to the Garden Street line were declared to have expired. There is probably no evidence in this record upon this question except the map marked No. 437, found opposite page 258 of the record, which shows that the Central Avenue and Quincy Street lines are totally separate and susceptible of independent operation or independent suspension of operation.

The system claim of the complainant, however, is really more insubstantial than appears from the observations heretofore made. The maps and ordinances which are in the record show that from time to time prior to 1893, the Council of the City of Cleveland authorized the construction of independent competing street railroads; that in 1893, four of these independent and competing railroads operating under grants limited to expire at widely different times of their own motion, and for their own purposes, consolidated themselves into The Cleveland Electric Railway Company. The record also shows that prior to 1903, The Cleveland City Railway Company had come into existence by the consolidation of at least two independent and competing companies (Record page 109), each of which was in itself a consolidated company, so that The Cleveland City Railway Company was composed of various companies to which independent and competing grants had been made. So far as this record is concerned, there is nothing to show that any of the various consolidations which took place were ever sanctioned by the legislative authorities of the City of Cleveland except the consolidation of 1893, by which The Cleveland Electric Railway Company was formed. It is perhaps a fact that some of them were sanctioned, and that terms and conditions for their consolidation were prescribed by the Council, but the point here sought to be made is that the street railroad policy

of the Council of the City of Cleveland, prior to 1893, was to enfranchise independent and competing companies operating various lines in various parts of the city, and that from 1893 no legislative action of the City of Cleveland has ever been taken which recognizes the process of consolidation by which the present complainant has absorbed its competitors in any such way as would constitute acquiescence on the part of the city in the formation of a system. On the contrary, while the complainant company has been industriously acquiring its competitors, the Council in its every act has continued to deal with the complainant as the owner of railroads, and not of a railroad, and wherever it has been called upon to grant it additional privileges and extensions, it has dealt with the company as to a particular line to be extended. The system contended for by the complainant is created by a process of induction which derives its semblance of truth from a persistent disregard of every instance inconsistent with the theory sought to be established, and the instances inconsistent with that theory are like the exceptions to the French rules of grammar, which are said to be more numerous than the cases which conform to the rule.

The fact is that the system theory is not even a discovery, but a pure invention, and counsel for the complainant were themselves so unfamiliar with the system theory at the time of the beginning of this lawsuit that in the original bill filed in March, 1905, they only contended for the grants acquired by them from The Cleveland City Railway Company that none of them expire before January, 1910. When the amended bill came to be filed, counsel had become more familiar with the working details of the invention, and the fifth paragraph of the amended bill applies the system theory to the grants acquired from The Cleveland City Railway Company, as well as to those originally owned by the complainant itself. The importance of this theory to the complainant is no doubt felt to be that this Court will hesitate

to disturb a settled institution, and to break up an extensive system of street railroads which is the outgrowth of years of construction and operation. The council of the City of Cleveland has never lent any countenance to the upbuilding of such an institution, and has never consented that it should cease to exercise the control over the constituent franchises of the present company which it reserved in the ordinances by which these franchises were granted. The complainant company has accepted a multitude of ordinances passed subsequent to 1893, authorizing extensions of the tracks of its various lines, and limiting those extensions to expire with the dates fixed for the expiration of the lines, and earlier than the claimed date of expiration for the system. One such ordinance is that of June 25, 1894 (Record, page 239). Another is the ordinance of August 8, 1901 (Record ,page 241). Another is the ordinance of June 23, 1902 (Record, page 243). In the pamphlet containing ordinances supplemental to the printed record which has been printed by the city and is supplied to the Court, there will be found a large number of ordinances passed by the city, accepted by the company, extending tracks of its various lines with different dates of expiration, and those ordinances were passed before the passage of the ordinances affecting Woodland Avenue and Garden Street, litigated in the case of the *City vs. The Cleveland City Railway Company*, in the 194th U. S., and in the case at bar.

QUESTION RAISED BY THE CROSS-APPEAL.

Paragraphs 28 and 29 of the complainant's bill (Record, pages 132 and 133), set forth the attack made upon Ordinance No. 42240 on the ground that it is a law of the State of Ohio taking from the complainant its property without due process of law. This attack is based upon section 14 of the ordinance (Record, page 132) which provides that the rights therein granted to The Forest City Railway Company are upon the express condition that the grantee shall pay to the

owner of the tracks, poles, wires and appliances erected in the highways along the route described, the value of such appliances in the highway to be agreed upon between the grantee and the owner not later than the 22nd day of December, 1904, plus an arbitrary sum of 20% added to such valuation, and that in the event that the grantee and the owner of such appliances are unable to agree, then the grantee shall pay to the owner such sum as shall be finally adjudicated by a court of competent jurisdiction to be the value thereof. This provision the complainant says requires it to turn over its property to The Forest City Railway Company, either upon a valuation to which it is compelled to agree, or to permit its property to be taken by The Forest City Railway Company and be remitted to damages in an action of trespass for the injury done it.

The answers of the two defendants concur in denying this interpretation of section 14 of the ordinance, both defendants saying in effect (Record, pages 155, 156) that section 14 is a mere attempt on the part of the Council to protect the complainant against hardship. An inspection of section 14 of this ordinance shows beyond question that it does not prescribe any duties for The Cleveland Electric Railway Company nor attempt to order it to adopt any course of conduct. It is a mere condition imposed upon the grant to The Forest City Railway Company that if it desires to have the privileges granted by the odinance it must do equity to its predecessors in the occupancy of those streets.

The question of real importance raised by this cross-appeal, however, is whether or not the tracks and fixed appliances of a street railroad company placed in a street under a contract with the municipal corporation limited to expire at a definite time and not removed by the railway company within the period of its lease, are removable? In other words whether street railroad tracks and appliances annexed to a public highway under such a franchise do not, upon the expiration of

the franchise, become a part of the realty and therefore the property of the municipal corporation?

This question has, so far as I have been able to discover, not been judicially determined. Fixtures occupy the border land between real and personal property, and things in their nature personal have been held at times real and at times personal, as the circumstances of the particular case seemed to require. In Ohio the case of *Teaff vs. Hewitt*, 1 O. S., 511, may be regarded as the leading case upon this subject. The Court there lays down three tests to determine whether or not personal property annexed to realty is to be considered a real or chattel fixture. These tests are:

1. The degree of annexation.

2. Adaptation of the thing annexed to use in that particular place.

3. The intention with which the annexation is made.

Thus it is said that if a chattel is so annexed to the freehold that its removal is impossible without disturbing the freehold it will be regarded as a real fixture and the right to remove denied. So it is said that if a thing personal in its nature is annexed to real estate, the thing annexed being of such a character that it is peculiarly adapted to use in that particular place, as for instance a blind cut for a particular window in a house, so that it is substantially useless elsewhere, the character of the chattel will be changed and it will become a real fixture. Both of these tests, however, seem to be but modes of arriving at the real intention with which the annexation was made and it is perhaps the fair result of the best considered cases on the subject of fixtures, to say that a chattel annexed to real property will be deemed a real fixture when the person making the annexation intended it to be permanent.

In dealing with the subject of fixtures the courts have drawn many distinctions based upon the relation of the parties as between whom the contention arose. Between mortgagor

and mortgagee the courts incline to favor the mortgagee and to prevent an impairment of his security. As between heir and personal representative the courts incline to favor the heir and to prevent a destruction of the value of the inheritance. As between the personal representative of a life tenant and the remainder man the law probably favors the personal representative of the life tenant. Most of the cases, however, arise between landlord and tenant and out of this relationship has grown the class of fixtures known as trade fixtures consisting of those chattels annexed to land held under lease, the annexation being made by the tenant for the purposes of the business which he desires to conduct on the leased premises. Here the policy of the law is to favor the tenant, it being a reasonable presumption that the annexation made by him was not for the improvement of the freehold in which he has no interest and was therefore not intended to be permanent. When, however, a tenant annexes chattels to a freehold and in his lease reserves no right of removal and subsequently allows his lease to expire without having removed, the courts hold this failure on his part a waiver of any right which he previously had so to to remove and in effect regard it as conclusive evidence of his original intention to make a permanent addition to the freehold.

The relation between the City of Cleveland and The Cleveland Electric Railway Company is probably not exactly that of landlord and tenant and not exactly licenseor and licensee. In Ohio the cities own the fee in the streets for public uses, one of those public uses, as the Supreme Court of Ohio has many times held, is the operation of street railroads. So that when a contract is made between a city and a street railroad company, under authority of which street railroad tracks are constructed in a street, the city must be deemed to have authorized the placing of structures in the streets appropriate to the trust under which it holds the title to them. Street railroad tracks therefore in a street are a proper struc-

ture and are consistent with the uses to which the street is to devoted. A street railroad company is apprized by the language of the statute itself that it can have no longer license or lease in the streets of an Ohio city than twenty-five years and in making its contract with the city it has the right and perhaps the duty to reserve to itself the right of removing its structures at the termination of its period of lease, if it so desires to do.

The nature of a street railroad in a street is such that in order to its construction the integrity of the soil must be disturbed, excavations must be made, ties of wood laid in the excavation, masses of concrete placed upon the ties and iron rails welded from end to end into a continuous piece are affixed to the ties—then the pavement consisting often of solid sheets of asphalt or of stone or of brick laid in cement are placed over the entire structure except the mere surface of the rails. To remove such a structure would necessarily damage the street, it would likewise almost destroy the value of the property removed. The degree of annexation, applying the old tests of *Teaff vs. Hewitt*, is as great here as is conceivable to be in any case. The adaptation of these particular rails and ties to use in this particular place is very great, for they must be broken up and substantially destroyed to be removed and reassembled in any other place, and what shall be said of the intention with which the annexation was made? It is entirely probable that the street railroad company at the time it made the annexation expected from time to time a renewal of its rights of operation, and that the statute contemplated the possibility of such renewals upon terms and conditions conducive to the public welfare by the Council. But if this expectation of the constructing company is disappointed it must be assumed to be because that company is unwilling to offer terms deemed conducive to the public interest by the Council and that therefore its failure to secure such renewal is, so far as the public is concerned, its own fault. This subsequent dis-

appointment could not affect the original intention with which the annexation was made.

But more significant still, there is no contract from the beginning to the end in which there is a reservation of a right on the part of the constructing company to remove at the termination of the lease, nor is there any provision inserted as to what shall be done by such a company upon the removal of its tracks and appliances to restore the street to the condition in which either it was found when entered by the company or in which it was prior to the removal of the structure. Under these contracts if the street railroad company has the right to tear up streets that are paved with stones and there is nothing in the contract that requires them to leave the streets in any other condition than open trenches from end to end.

And what has the company the right to remove, what it placed there? Manifestly not, for both under the statutes of Ohio and under these contracts the company has placed paving in the street and it would not be contended that it had the right to remove paving, so that it would seem that the intention with which these structures were placed in the street was that they should be permanent; that they are so affixed to the freehold that both the fixtures and the freehold would be damaged by removal and that these structures are an essential part of a complete street when they are thus installed. Citation of authority upon the various propositions here suggested is not necessary so far as the general law on the subject of fixtures is concerned and upon the special question here raised there are no decided cases. It may be helpful, however, to call attention to the case of *Cincinnati & Spring Grove Avenue Street Railway Company vs. Cumminsville*, 14 O. S., 523, as authority for the proposition that a street railroad in a street is a mere part of the public use for which the street is owned by a municipality. Also the case of *Traction Company vs. Parish*, 67 O. S., 181, as containing a comprehensive

statement of the law of Ohio on the relation of the municipality to its streets and of street railroad rights in streets.

The cases which hold railroad tracks, switches and appliances real estate for purposes of taxation are illustrative as are the cases which hold such appliances real estate in order to bring them under the cover of a mortgage, but it must be admitted that these cases are not conclusive—their effect is probably summed up in 1 *Elliott on Railroads*, Sec. 31 as follows: "In those cities in which the subject is controlled by statute the preponderance of authority is to the effect that only the land owned by the railroad company, together with the ties, rails and other structures permanently affixed thereto, is realty and that engines, cars and other movable appliances are to be regarded for most purposes as personalty."

See also *Prov. Gas Company vs. Thurbur*, 2 R. I., 15, where it is held that gas pipes laid by a corporation in a public street by authority of a charter repealable at the will of the Legislature and sunk into the soil to the depth of several feet and not removable without digging up the earth are fixtures and taxable as realty.

In *Coe vs. Railway Company*, 10 O. S., 372, the question arose as to whether the rails and permanent fixtures, as well as the rolling stock, were to be included within the provisions of a real property mortgage. The Court on page 378 draws the distinction between permanent structures, "the timber and iron for the track, the stones and timber for bridges and culverts" and the locomotives, cars and other articles, holding the former to be real fixtures and the latter to be personal property.

This Court in the case of *Wiggins Ferry Company vs. Ohio & Mississippi Railroad Company*, 142 U. S., 396, held that railroad tracks placed by the railroad company on the land of the Ferry Company for a temporary use were properly removed by the receiver of the railroad company and said

"As between landlord and tenant or one in tempo-

> rary possession of land under any agreement whatever for the use of the same, the law is extremely indulgent to the latter with respect to the fixtures annexed for the purpose connected with such tempory possession."

This case, however, shows that there was no definite lease at the end of which the tenant would have known that his rights expired, nor were the railroad tracks so let into the property of the Ferry Company that tracks themselves would be damaged and the property of the Ferry Company likewise damaged by their removal. It would hardly seem, therefore, that the question here presented is adjudicated by that case.

The defendants below relied upon the fact that Section 14 of the ordinance No. 42240 was not, when properly interpreted, an attempt to take the property of the complainant company without due process of law but was a mere effort on the part of the public authorities to protect the complainant as fully as it could from any loss by reason of the change of tenants upon the streets in question. Upon this position the city still relies and it is respectfully submitted that the decree rendered by the Circuit Court should in this respect be reversed.

For the reasons above set forth the City of Cleveland respectfully submits that the rights of The Cleveland Electric Railway Company in Central Avenue, Erie Street and Quincy Street expired on the 22nd day of March, 1905, and that the decree of the Circuit Court to that effect should be affirmed.

Respectfully submitted,

NEWTON D. BAKER,

City Solicitor.

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JAMES H. McKENN

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

No. 197.

THE CLEVELAND ELECTRIC RAILWAY COMPANY,
APPELLANT,

vs

THE CITY OF CLEVELAND ET AL.

ADDITIONAL ORDINANCES SUBMITTED BY THE CITY OF CLEVELAND

NEWTON B. BAKER,
City Solicitor.

F. W. ROBERTS CO., PRINTERS, CLEVELAND, OHIO

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

No. 197.

THE CLEVELAND ELECTRIC RAILWAY COMPANY, APPELLANT,

vs

THE CITY OF CLEVELAND ET AL

ADDITIONAL ORDINANCES SUBMITTED BY THE CITY OF CLEVELAND

AN ORDINANCE to grant the St. Clair Street Railroad Company an extension of its charter for a term of twenty-five years.

Section 1. Be it ordained by the City Council of the City of Cleveland, that the St. Clair Street Railroad Company, its successors and assigns, be and the same are hereby authorized to reconstruct, maintain and operate its double track street railway with the necessary switches, turn-tables and turn-outs, commencing at Water street, thence through and along St. Clair street to Becker avenue, subject to the following conditions and limitations, to-wit:

Sec. 2. All tracks hereafter laid by said company to be of the same gauge as heretofore and now existing, or standard gauge, and the rail of the pattern as now laid and used on

said railway or that may be hereafter found necessary and consented to by the City Council, with suitable gutters at all necessary points, so as to permit the free flow of water under the same and on such grades as are now or may hereafter be established by the City Council, and subject at all times to be taken up and relaid whenever deemed necessary by the Council.

Sec. 3. Whenever the city shall deem it necessary to grade, regrade, pave or repave any streets wherein said tracks are laid, the company shall be required to pave or pay the cost of the same at such time and in such manner as the board of improvements may direct (at the city's option), any part or all the track between the rails used by them with such pavement as the Council and Board of Improvements may deem proper, unless, in the judgment of the Council and Board of Improvements, pavement laid prior to such repaving shall be in sufficiently good condition and grade. And said company is also required to keep such pavement in constant good order, said paving and repairing to be done under the direction of and to the acceptance of the Board of Improvements.

Sec. 4. Said company shall place and continue on said railway good cars with all modern improvements for the convenience and comfort of passengers, and shall run cars thereon as public convenience may, in the judgment of the City Council, require, under such directions as the City Council may from time to time prescribe.

Sec. 5. Said company shall not charge more than five cents each way for one passenger on the whole or any part herein renewed, but said company may charge a reasonable compensation for carrying packages.

Sec. 6. It is understood and agreed that the City of Cleveland shall not be held liable to said company for any damage resulting from the breakage of any sewer or water pipes, or from any delay that may be caused by the construction of sewers, the laying of water or gas pipes, or the necessary repairing of the same, or from any delay or damages that may be

caused by fire or otherwise, all rights vested in the City Council, the trustees of waterworks or gas company in respect to the care and improvement of streets, the construction of sewers, culverts or drains, the laying of water and gas pipes therein, are in no way to be impaired or affected by the privileges hereby granted to said company, but the rights and privileges hereby granted to said company, by virtue of this ordinance shall be subject thereto; and said company shall be liable for any loss or injury that any person may sustain by reason of any carelessness, neglect or misconduct of their agents or servants in the management, construction or use of said railway and said company shall indemnify and hold the city harmless from any damage that may be claimed by property holders, or by any person or persons, on account of laying of the track, or in the use, or by the reason thereof, or by running the cars thereon.

Sec. 7. Said company shall be required to pay to the City of Cleveland an annual license of ten dollars for each car used on this railway.

Sec. 8. The authority and privilege in this ordinance named and provided for are to be and remain in force for the full period of twenty-five years from the date of the passage of this ordinance, the said company, its successors and assigns, performing the several conditions by this ordinance required.

Sec. 9. That in case of failure by neglect or otherwise on the part of said St. Clair Street Railroad Company, its successors or assigns, to perform all and singular the conditions of this ordinance, together with all and singular the general ordinances of the city now or hereafter in force or amendments hereto, the privileges hereby granted and renewed shall become void and of no effect and shall cease upon the adoption of an ordinance of the Council to that effect.

Sec. 10. This ordinance shall take effect and be in force from and after its passage and legal publication and filing by said company with the city clerk of a written acceptance of the

terms and conditions thereof and paying to the city the cost of printing the same.

Passed January 5, 1885.

AN ORDINANCE to grant to the Superior Street Railroad Company an extension of its charter for a term of twenty-five years.

Section 1. Be it ordained by the City Council of the City of Cleveland, that the Superior Street Railroad Company, its successors and assigns, be and the same are hereby authorized to reconstruct, maintain and operate its double track street railway, with necessary switches, turn-tables and turn-outs, commencing in Superior street at the west side of Monumental Park; thence along and through Superior street to East Madison avenue, and along and through Payne avenue from the intersection of Superior street to Willson avenue, thence along and through Willson avenue to Lexington avenue; thence along and through Lexington avenue to East Madison avenue; *Provided,* however, that in case the city should at any time in the future find it necessary (in order to avoid crowding Superior street at the point of the beginning of said route) to change the westerly terminus by extension in such manner as to avoid a stop for turning or changing horses, said conditions to change terminus shall be complied with by said company; and *provided* further, that the city reserves the right to compel joint use with other companies of all tracks in Superior street, as far east as Erie street; and, if in the judgment of the city, it be necessary to construct additional tracks for the accommodation of the public, then said company shall construct such tracks, switches and turn-outs as the city may require, subject to the following conditions and limitations, to-wit:

Sec. 2. All tracks hereafter laid by said company to be standard gauge and the rails of the same patterns as now laid and used on said railroad, or that may be hereafter found necessary and consented to by the City Council, with

suitable gutters at all necessary points so as to permit the free flow of water under the same and on such grades as are now or may hereafter be established by the City Council, and subject at all times to be taken up and relaid whenever deemed necessary by the Council.

Sec. 3. Whenever the city shall deem it necessary to grade, regrade, pave or repave, any streets wherein said tracks are laid the company shall be required to pave or pay to the city the cost of the same at such time and in such manner as the Board of Improvements may direct, at the city's option, any part or all the track between the rails used by them with such pavement as the Council and Board of Improvements may deem proper, unless in the judgment of the Council and Board of Improvements the pavement laid prior to such repaving shall be in sufficiently good condition and grade; and said company is also required to keep such pavement in constant good order, said paving and repaving to be done under the direction of and to the acceptance of the Board of Improvements.

Sec. 4. Said company shall place and continue on said railway good cars with all modern improvements for the convenience and comfort of passengers and shall run cars thereon as public convenience may in the judgment of the City Council require under such directions, as the City Council may from time to time prescribe.

Sec. 5. Said company shall not charge more than five cents each way for one passenger on the whole or any part herein renewed. The company shall sell tickets through its conductors at rates as follows: Eleven (11) for fifty cents and twenty-two (22) for one dollar; but said company may charge a reasonable compensation for carrying packages.

Sec. 6. It is understood and agreed that the City of Cleveland shall not be held liable to said company for any damages resulting from the breakage of any sewer or water pipes, or for any delay that may be caused by the construction of sewers, the laying of water or gas pipes, or the necessary

repairing of the same, or for any delay, or damages that may be caused by fire or otherwise. All rights vested in the City Council, the trustees of water works or gas company in respect to the care and improvements of streets, the construction of sewers, culverts or drains and the laying of water and gas pipes therein are in no way to be impaired or affected by the privileges hereby granted to said company, but the rights and privileges granted to said company by virtue of this ordinance shall be subject thereto, and said company shall be liable for any loss or injury that any person may sustain by reason of any carelessness, neglect or misconduct of their agents or servants, in the management, construction or use of said railway. And said company shall idemnify and hold the city harmless from any damage that may be claimed by property holders or by any person or persons on account of the laying of the track, or in the use, or by reason thereof, or by running the cars thereon.

Sec. 7. Said company shall be required to pay the City of Cleveland an annual license fee of ten dollars for each car used on this railway.

Sec. 8. The authority and privileges in this ordinance named and provided for are to be and remain in force for the full period of twenty-five years from the date of the passage of this ordinance, the said company, its successors and assigns, performing the several conditions by this ordinance required.

Sec. 9. That in case of failure by neglect or otherwise on the part of said Superior Street Railroad Company, its successor or assigns, to perform all and singular the conditions of this ordinance or amendments hereto, together with all and singular the general ordinances of the city now or hereafter in force or amendments thereto, the privilege hereby grantd and renewed shall become void and of no effect and shall cease upon the adoption of an ordinance of the Council to that effect.

Sec. 10. This ordinance shall take effect and be in force from and after its passage and legal publication and filing by said company with the city clerk of a written acceptance of the terms and conditions thereof and paying to the city the cost of printing the same.

Passed January 26, 1885.

AN ORDINANCE to fix the terms and conditions upon which the railway tracks of the West Side Street Railroad Company and the tracks of the Woodland Avenue Railway Company and said companies may be consolidated.

Section 1. Be it ordained by the City Council of the City of Cleveland, that the consent of the city is hereby given to the consolidation of the West Side Street Railroad Company and the Woodland Avenue Railway Company on the following conditions:

The said consolidated company to carry passengers through without change of cars by running all cars through from the workhouse on the line of the Woodland Avenue Railway to the point on the West Side Street Railroad where Gordon avenue crosses Lorain street, and when practicable in the judgment of the council to do likewise on the branches of the consolidated line, and that for a single fare from any point to any point on the line or branches of the consolidated road no greater charge than five cents shall be collected, and that tickets at the rate of eleven for fifty cents or twenty-two for one dollar shall at all times be kept for sale on the cars by the conductors.

Sec. 2 Said consolidated company shall be subject to all the liabilities, conditions and penalties to which said several companies are liable; and said consolidated company and its tracks shall at all times be subject to the control, regulation and supervision of the City Council, to the same extent that the said several companies and their tracks are now liable.

Sec. 3. This ordinance shall take effect and be in force from and after its passage and legal publication, the filing with the city of a written agreement accepting and agreeing to the

terms thereof, signed by the proper persons for the companies consolidated, and the payment to the city of the expenses of printing and publishing this ordinance.

Passed February 16, 1885.

AN ORDINANCE granting the Woodland Avenue and West Side Street Railroad Company the right to use electricity in operating its street railroad.

Section 1. Be it ordained by the City Council of the City of Cleveland, That the Woodland Avenue & West Side Street Railroad Company is granted permission to operate its entire line of street railroad, as the same now exists, with any and all extensions that may hereafter be made thereto, by electricity as a motive power, using such electric plant in the public streets as shall be acceptable to the Board of Improvements, and, for such purposes, said company shall have the right to erect and maintain poles, wires, fixtures or conduits and all other appliances or appurtenances that, in the opinion of said board, shall be found necessary to successfully operate its street railroad by electricity.

Sec. 2. In the erection of poles and the placing of wires or conduits, and in the use of any and all other appliances or appurtenances that may be found necessary to operate its line of electricity, before the improvement shall be made upon any or all of its lines for the purpose of using electricity, a plan of the same, showing all poles, wires and other appliances or appurtenances that said company shall desire to use, shall be submitted to and approved by the board of improvements, said board having the right to fix the distance at which poles shall be apart, the height of all poles and wires, and the size and location of all conduits, and to regulate the places within the streets where any and all appliances or appurtenances shall be located, and to establish such regulations with reference to the public safety, protection, painting and sightliness of the poles and appurtenances as the said Board of Improvements shall determine.

Sec. 3. The running of cars on any part of the lines of such company may be suspended by the Board of Improvements for such reasonable time as may at any time be necessary on account of the construction or repairs of streets, or sewers, or other public improvements, and whenever it may be necessary to have any track taken up for the purpose aforesaid the same shall be taken up and relaid at the expense of said railroad company whenever required by said board.

Sec. 4. Said railroad company shall at all times hereafter defend, keep harmless and indemnify the City of Cleveland from any and all damages, lawful claims and demands for injuries to persons or property, costs and expenses to which said city may be subjected, or made liable by any proceeding at law or in equity or otherwise growing out of the grant of the privileges in this ordinance granted, or out of the exercise and enjoyment of the same by said company.

Sec. 5. Said company shall at all times conform to such rules and regulations as may from time to time be made by the Council and approved by the Board of Improvements, as to the rate of speed it may run its cars, and while the cars of said company are in motion, or about to start, warning shall be given by bell or otherwise, to notify persons of any immediate or approaching danger.

Sec. 6. That the city reserves to itself the right to grant to any other person or persons, company or corporation, a joint use for street railroad purposes of the tracks, poles, wires, electric currents and other appliances herein provided for upon such portion of said Woodland Avenue and West Side Street Railroad Company's lines from the intersection of Pearl and Lorain streets, northerly along Pearl street to the Superior street viaduct; thence along the Superior street viaduct to Water street; thence along Superior street to Ontario street; thence along Ontario street to southerly line of Factory street, as is free territory under existing grants upon such terms and conditions as to occupation and compensation as the City

Council may deem just and reasonable in case such companies should fail to come to such agreement by and between themselves.

Sec. 7. The grant herein made shall be in force from and after the date of the passage and legal publication of this ordinance, and the written acceptance of the same by said company, and said company shall have the right to maintain and operate its present line and any and all extensions until the expiration of the present grant of said company, to-wit. The 10th day of February, 1908.

Sec. 8. Nothing contained in this ordinance shall in any wise release or relieve said company from compliance with all other ordinances relating to street railroads now in force, or which may hereafter be adopted by the City Council, including all amendments hereto and thereto.

Sec. 9. Said railroad company shall in writing accept the permission and privileges hereby granted and agree to comply therewith.

Sec. 10. This ordinance shall take effect and be in force from and after its passage and legal publication and the payment to the city auditor by said company of the expense of publication.

Passed March 22, 1889.

AN ORDINANCE granting to the Cleveland City Cable Railway Company the right to extend its line of railway in Hough avenue to the southerly side of said avenue and to cross Ansel avenue to the easterly line thereof on certain lines herein described.

Section 1. Be it ordained by the City Council of the City of Cleveland (two-thirds of the members concurring), That the Cleveland City Cable Railway Company, be and it is hereby authorized to extend and operate its line of double track railway in Hough avenue to the southerly side of said avenue, and to cross Ansel avenue to the easterly line thereof at the established grade of said avenue on the following

described center line between said tracks, to-wit: Beginning at a stone monument in the center of Hough avenue at a point seven hundred and thirteen (713) feet easterly of a stone monument in the center of Hough avenue and of Holt street, and thence in a direct line to a stone monument in the center of Doan street four hundred and fifty-four (454) feet south of a stone monument in the center of said Doan street and on the north line of Park Boulevard, as recorded in the Wade Park allotment, said line being the same center line as described in ordinance No. 1130, passed March 17, 1890, for the purpose of extending said Hough avenue between said points.

Sec. 2. That the tracks of said company shall cross said Ansel avenue at the established grade thereof, as fixed by ordinance No. 1453, passed April 7, 1891, if said tracks are constructed in advance of the grading of said Ansel avenue by the city. All necessary excavation, embankment, filling and side slopes necessary to properly sustain said tracks at such established grade shall be made by, or at the expense of said company, together with all necessary catch basins and connections, boxes and drains necessary to protect said embankment and street as shall be ordered by the Director of Public Works of said city.

Sec. 3. That said company shall make and maintain suitable approaches and roadways to and across said embankment for the accommodation of public travel and of private parties having the right to use the same, which approaches or roadways shall be of the full width of said Ansel avenue, and so constructed that the approaches from the northerly side of said crossing shall be filled to the established grade of said Ansel avenue, all as ordered by said Director of Public Works and as shown on the profile of said street on file in the office of chief engineer.

Sec. 4. That said company shall hold the city harmless from all claims for damages to person or property that may arise by reason of placing said embankment, approaches and

slopes, tracks, structures and drainage in, upon or across said Ansel avenue as herein provided.

Sec. 5. Said company is also hereby granted the right to extend and operate its line of tracks with proper curves, from its tracks now in the center of said Hough avenue to the southerly side of said avenue, and across said Ansel avenue to the easterly line thereof, upon the line heretofore described in Section 1 of this ordinance, as extending from Hough avenue to Doan street, proper catch basins, pipes, drains and crossings to be constructed at this point as shall be required by the Director of Public Works.

Sec. 6. That said grant as herein made to said company shall terminate with the grant of its main line, to-wit: Twenty-five (25) years from January 26, 1885, and is made on the condition that cars shall at no time be allowed to stand on or to be switched upon said Ansel avenue; that said company shall, within one year from the date hereof, secure and deed or dedicate to the city, free of cost, the right of way for a public street not less than sixty (60) feet in width, extending from Hough avenue to the easterly line of Ansel avenue, upon the line heretofore described in Section 1 of this ordinance, and as referred to in ordinance No. 1130, said street between said points to be properly graded, and proper culverts and drainage constructed by and at the expense of said company, all in such manner and to such grades as shall be acceptable to said Director of Public Works prior to such dedication, it being understood that said company shall have the right to construct and operate its line of cable railway upon the entire portion of said right of way between said points, either before or after its dedication to the city, at the option of said company, but within one year from the date hereof, and subject, after construction and dedication of right of way, to all provisions of law and ordinance and all rules and regulations now in force or hereafter to be in force governing street railways in public streets; and provided that the said railway company shall in writing accept the conditions and privileges

hereby prescribed and granted, within ten days after the passage and legal publication of this ordinance.

Sec. 7. That ordinance No. 1130, passed March 17th, 1890, providing for the extension of Hough avenue across said Ansel avenue to Doan street, be and the same is hereby repealed, and that this ordinance shall be in force and take effect on and after its passage and legal publication and the filing with the city clerk of a written acceptance by said company of the terms and conditions of this ordinance, and payment of the cost of its publication.

Passed June 22, 1891.

RESOLUTION.

By Mr. O'Brien:

That in the opinion of this Council all franchises granted by this Council for the use of streets for street car lines should terminate July 1, 1914, instead of 25 years hence.

Adopted March 27, 1893.

This is to certify that an examination of the records of the Council of the City of Cleveland shows that on the 27th day of March, 1893, when the resolution introduced by Mr. O'Brien as to dates of expiration for street railway franchises was passed, there was pending in the council an establishing ordinance introduced pursuant to an application therefor by L. A. Russell and W. C. Schofield; said application requesting the establishment of a route to be operated subject to competitive bidding, and there was also pending the application of The Cleveland Electric Railway Company hor a grant for twenty-five (25) years for a cross-town line in Willson avenue.

Said records of the council further disclose the fact to be that an election for councilmen was held on the 1st day of April following, and five persons of the members of the Council on said 27th day of March ceased to be members thereof subsequent to said election. The total membership of the Council of the City of Cleveland at that time was twenty.

Given under my hand this 3d day of November, 1906.

Seal of City Clerk of the City of Cleveland

PETER WITT, *City Clerk.*

AN ORDINANCE granting permission to the Cleveland City Railway Company to extend its tracks from Superior street, along Erie street, to St. Clair street.

Section 1. Be it ordained by the City Council of the City of Cleveland, that the Cleveland City Railway Company is hereby granted permission to extend its double-track street railroad on and along Erie street from its present tracks at the intersection of Superior and Erie streets to the intersection of St. Clair and Erie streets, connecting its tracks on Superior street with its tracks on St. Clair street, with the necessary curves, and also poles and overhead wires, and to construct and maintain said extension and to operate the same by means of electricity as a motive power, upon the following terms and conditions:

Sec. 2. The laying of such tracks and the erection of such poles and the placing thereon of the necessary wires and the appliances shall be under the supervision and control of the Director of Public Works, and such poles shall be of such size and shall be set at such places as shall be required by said director. Should it become necessary in the prosecution of any work by the city that such poles be temporarily moved, such removal shall be made and such poles shall be reset by said company at its own cost. The running of cars on any part of the lines of street railroads of said company may be suspended by the board of control for such period as may at any time be necessary on account of repairs of streets or sewers or the making of any public improvements, and whenever it may be necessary to have any track taken up for any of the purposes aforesaid the same shall be taken up and relaid at the expense of said company.

Sec. 3. The said company shall at times use such precautions for the public safety as the Board of Control may from time to time require, and shall at all times defend, keep harmless and indemnify the City of Cleveland from and against all lawful claims and demands for any injury to persons or property, costs or expense to which the city may be subjected or

made liable by any proceedings at law or in equity or otherwise, growing out of this grant or out of the exercise or enjoyment of the same by said company.

Sec. 4. Within ninety days after the passage of this ordinance, the said company shall pay into the city treasury a sum equal to the cost of so much of the present pavement in Erie street and said street intersections as is embraced in a strip sixteen feet wide, extending from the northerly rail of the tracks now in Superior street to the southerly rail of the tracks now in St. Clair street, such cost to be ascertained, and determined by the Director of Public Works, and such portion thereof as was paid by the owners of abutting property, shall be repaid by the city to the present owners of such property, in such manner as the Council may deem proper. Whenever the Council shall deem it necessary to repave Erie street, said company shall pave, or pay the cost of paving as the Council may elect, a strip of sixteen feet in width along the entire length of said extension with such a pavement as the Council may deem proper.

Sec. 5. The said company shall comply with and perform all the terms and conditions set forth in a communication from the Woodland Avenue and West Side Railway Company, and the Cleveland City Cable Railway Company to the Council on the 15th day of May, 1893, in reference to the consolidation of said companies under the name of the resolution adopted by the Council on the same date consenting to such consolidation. Upon all its lines of street railroads within the City of Cleveland, said company shall place and continue the most approved cars, equipped and furnished with such improvements, equipments and appliances as the Council may deem proper for the safety, convenience and comfort of passengers, shall run said cars in such numbers, at such intervals of time, and under such rules and regulations as the Council may from time to time require, and shall cause the said cars to stop at all street intersections at which any person may desire to leave or enter the same. The Council shall have the right at any time to

require said company to operate its cars over the entire length of any of the lines of branches of the said constituent companies in the same manner and between the same terminals as cars were operated prior to the consolidation of said constituent companies under the name of The Cleveland City Railway Company. Night cars shall be operated throughout the entire length of each of the lines of said company, at least hourly each way, between midnight and 6 o'clock a. m. daily. The said company shall also, whenever and as often as may be required by the Director of Public Works, sprinkle between the outer rails of its tracks, including the space commonly known as the devil strip, on all streets and street intersections wherein any track on any of the lines of said company are laid, in a manner satisfactory to said director. In consideration of the grant made by this ordinance, said company agrees that all the terms and provisions of this section shall apply to and be a condition upon each and all of the grants heretofore made by the council under which the existing lines of street railroad now operated by the Cleveland City Railway Company have been constructed.

Sec. 6. This grant shall be in force until the 26th day of January, 1910, but the Council reserves and shall at all times have the right to authorize any other individual, company or corporation to jointly occupy and use, for street railway purposes, the whole or any part of the tracks and appliances, wires and poles herein authorized to be constructed on said extension, upon such terms and conditions as the Council may deem just and reasonable, unless such individual, company or corporation shall otherwise agree with said The Cleveland City Railway Company as to the terms and conditions of such use and occupation.

Sec. 7. The said company within ten days after the passage of this ordinance shall pay to the city the cost of publishing the same, and shall file with the city clerk an acceptance, in writing, of the rights and privileges herein granted, and therein agree to comply with and perform all the terms and conditions

upon which the same are granted, and as soon after such acceptance as the Board of Control may direct, said company shall commence the work of constructing said extension, and shall complete the same within four months thereafter; otherwise this ordinance shall be null and void.

Sec. 8. The failure or refusal of said company at any time to comply with and perform all and singular the terms and conditions of this ordinance, or the general ordinances of the city relating to street railroads, now or hereafter in force, shall work a forfeiture of this grant, and the rights and privileges hereby granted shall become null and void, upon the adoption of a resolution by the Council to that effect. Nothing in this ordinace contained shall be held to release said company from any of the conditions of any of the grants heretofore made by the city to any of said constituent companies.

Section 9. This ordinance shall take effect and be in force from and after its passage and legal publication.

Passed July 3, 1893.

ORDINANCE 3451.

NO. 3451—AN ORDINANCE granting permission to the Cleveland City Railway Company to extend its tracks from Superior street northerly in and along Ansel avenue to the city limits.

Section 1—Be it ordained by the Council of the City of Cleveland, that the Cleveland City Railway Company be and it is hereby granted permission to extend its tracks from Superior street northerly in and along Ansel avenue to the city limits, at the center of St. Clair street, with all necessary curves, switches, turnouts, poles, overhead wires, and other appliances for the proper construction of a double track railroad, and the operation thereof with electricity, and to construct and maintain said tracks, curves, switches, turnouts, and operate the same in connection with the other lines of street railway owned, with the same motive power as is used upon other portions of its lines, upon the following terms and conditions:

Sec. 2—The laying of such tracks and the erection of such poles and the placing thereon of the necessary wires and appliances shall be under the supervision and control of the Director of Public Works, and such poles shall be of such size, and shall be set at such places as shall be required by said Director. Should it become necessary in the prosecution of any work of said city that such poles shall be temporarily moved, such removal shall be made and such poles reset by said company at its own cost.

The running of cars upon any part of the lines of street railroad of said company may be suspended by the Board of Control for such period as may at any time be necessary on account of repairs of the street, or sewers, or the making of any public improvement.

Whenever it be necessary to have any tracks taken up for any of the purposes aforesaid, the same shall be taken up and relaid at the expense of said company.

Sec. 3—The said company shall at all times use such precautions for public safety as the Board of Control may from time to time require, and shall at all times defend, keep harmless, and indemnity the City of Cleveland from and against all lawful claims and demands for any injury to persons or property, costs and expenses to which the city may be subject, or made liable by any proceedings at law or in equity, or otherwise, growing out of this grant, or out of the exercise and enjoyment of the same by said company.

Sec. 4—Said company shall, at the time said tracks are constructed, pave the same and the space between its tracks, the devil strip, so called, with brick or stone pavement, to the satisfaction of the Board of Control, and shall keep said pavement in good repair during the continuance of this grant. Whenever the street is paved, in addition to the foregoing the said company shall pave or pay for paving, one foot on the outside of the outer rails of its tracks.

Said company shall issue to all passengers proper transfer checks to any and all passengers going to or from said ex-

tension, so that all passengers may have a continuous ride from said company's Superior or St. Clair street lines to and upon said extension or from said extension to and upon the Superior and St. Clair street lines of said company.

Sec. 5.—This grant shall terminate at the expiration of the other grants made to this company, to-wit: January 26, 1910.

Sec. 6—Said company shall, within ten days after the passage of this ordinance, pay to the city the cost of publishing the same, and shall file with the City Clerk an acceptance in writing of the rights and privileges herein granted, and therein agree to comply with and perform all of the terms and conditions upon which the same are granted, and shall build and complete this extension and have the same in operation on or before the 1st day of August, 1894.

Sec. 7—The failure or refusal of said company at any time to comply with or perform all and singular the terms and conditions of this ordinance and the general ordinances of the city relating to street railroads, now or hereafter in force, shall work in forfeiture of this grant, and the rights and privileges hereby granted shall become null and void upon the passage by this Council of the proper ordinance revoking said grants.

Sec. 8—This ordinance shall be in force from and after its passage and legal publication.

Passed March 12, 1894.

ORDINANCE 6920A.

ORDINANCE NO. 6920A—AN ORDINANCE granting permission to the Cleveland Electric Railway Company, its successors or assigns, to extend its street railroad from the junction of Miles avenue and Broadway to Woodland Hills avenue, and across Gates and McConnell streets.

Section 1—Be it ordained by the Council of the city of Cleveland, That the Cleveland Electric Railway Company, its successors or assigns, be and it is hereby granted permission to extend its line of railway, and to construct, maintain, and operate a double track street railway, with the necessary poles,

wires, and other electrical appliances, in and along Broadway, from its present tracks in Broadway at Miles avenue to the south line of Woodland Hills avenue and across Gates and McConnell streets, and provided that said railroad company shall place suitable lights of not less than five incandescent lights in each group at the crossing of Woodland Hills avenue, Miles avenue, and Gates street.

Sec. 2—The city hereby reserves the right to authorize the joint use of said tracks over said extension to any other company or companies, upon such terms as to compensation as may be agreed upon by such company or companies and the Cleveland Electric Railway Company, or in case of inability of such companies to agree, then upon such terms as may be fixed by the City Council.

Sec. 3—Said Cleveland Electric Railway Company shall grade, improve, and pave with dressed block Medina stone, with concrete filling, a strip sixteen feet in width in Broadway, from Miles avenue to Woodland Hills avenue, and all street intersections, and maintain the same in good condition, and to the acceptance of the Board of Control.

Sec. 4—No additional fare shall be charged by said company by reason of this extension, and further provided that no freight of any kind or description shall be hauled or carried over such extension or said company's main line or part or parts thereof without the consent of the Council.

Sec. 5—Said Cleveland Electric Railway Company shall begin the laying of the tracks herein authorized within nine months after the passage of this ordinance, and shall have the same completed within sixty days thereafter.

Sec. 6—This grant shall expire with the grant of its main line and extension as made July 1, 1889.

Sec. 7—The rights and privileges herein granted shall be subject to the provisions of the grant of said company's main Broadway line, and of the said ordinance of July 1, 1889, and of the general street railroad ordinances, so far as the same may be applicable, and not inconsistent herewith, and such

further and future regulations as may be ordered by the Council.

Sec. 8—Said company shall file with the City Clerk within thirty days after the passage of this ordinance a written acceptance of the same, and such an acceptance shall be deemed an agreement to perform all and singular the conditions and requirements of this ordinance; otherwise, this ordinance shall be null and void.

Sec. 9—This ordinance shall be in force from and after its passage and legal publication, and the payment to the City Treasurer of the cost of such publication.

Passed August 19, 1895.

ORDINANCE NO. 12186A—AN ORDINANCE granting the Cleveland Electric Railway Company permission to construct and operate an extension of its railway in Burton street and Rhodes avenue, from Storer avenue to Denison avenue.

Section 1. Be it ordained by the Council of the City of Cleveland, That the Celveland Electric Railway Company be and it is hereby granted permission to extend its double track street railroad on and along Burton street, from its present tracks at the intersection of said Burton street and Storer avenue, to Rhodes avenue, and on and along Rhodes avenue from Burton street to Denison avenue, with the necessary curves, Y's, and switches, and to maintain and operate said extension by means of electricity as a motive power, with the necessary poles, wires, and appliances, upon the following terms and conditions:

Sec. 2. All tracks laid by said company shall be of standard gauge, ninety-pound girder rails, or such improved rails as may hereafter be consented to by the Board of Control, with suitable gutters at all necesasry points so as to permit the free flow of water under the same, and on such grades as are now or hereafter may be established by the City Council, and subject at all times to be taken up and relaid whenever deemed

necessary by the City Council to grade said street, construct sewers, or lay water or gas pipes or wires therein at the expense of said company.

Sec. 3. The laying of said tracks and the erecting of said poles, and the placing thereon of the necessary wires and appliances shall be under the supervision and control of the Director of Public Works, and said poles shall be of such size and shall be set as such places as shall be required by said Director. Should it become necessary in the prosecution of any work by the city that such poles be temporarily moved, such removal shall be made and such poles be reset by said company at its own cost. The running of cars on any part of the lines of street railroad of said company may be suspended by the Board of Control for such period as may at any time be necessary on account of repairs of streets or sewers, or the making of any public improvement, and whenever it may be necessary to have any track taken up for any of the purposes aforesaid, the same shall be taken up and relaid at the expense of said company.

Sec. 4. The city hereby reserves the right to authorize the joint use of said tracks of said railway company herein described to any other company or companies, upon such terms as to compensation as may be agreed upon by said company or companies and the Cleveland Electric Railway Company, its successors or assigns, or in the case of the inability of said companies to agree upon any such terms as may be fixed by the Board of Control and City Council.

Sec. 5. Said company shall at the time of constructing said extension pave its tracks and the space between its tracks, including the space commonly known as the devil strip, also a space one foot in width on the outside of each outside rail, in said extension, with such pavement as may be required by the Board of Control, the same to be done under the direction and to the acceptance of the Director of Public Works; and said company shall keep in constant good order and repair sixteen

feet in width along the center of the roadway of said Burton street and Rhodes avenue, between the points aforesaid.

Sec. 6. Said company shall run through cars on said Burton street and Rhodes avenue in such numbers, at such intervals of time, and under such rules and regulations as the Council may from time to time require, and shall cause the said cars to stop at all street intersections at which any person may desire to leave or enter the same, and at such other places as the Council shall from time to time require. Night cars shall be operated by said company throughout the entire length of said extension at least hourly each way, between midnight and 6 o'clock a. m. daily, whenever required by the Council. Only the most improved motors and cars now or hereafter in use shall be used on said extension, and the same shall be equipped and furnished with such improvements, equipments, and appliances as the Council may deem proper for the safety, convenience, and comfort of passengers and the public.

All cars shall be properly lighted at all times between sunset and sunrise; shall be so heated as to maintain a temperature not lower than 60 degrees Fahrenheit therein at all times, and shall be supplied with such guards as shall securely enclose the tracks thereof. The said company shall, whenever and as often as may be required by the Director of Public Works, sprinkle between the outer rails of the track on said extension, including the space commonly known as the devil strip, in a manner satisfactory to said Director. Failing so to do, the city shall have the right to have said sprinkling done and the company shall pay the city the cost of the same.

Sec. 7. No additional fare shall be charged any passenger by reason of this extension, and said company shall not charge more than five cents fare each way for each passenger over the whole or any part of its line, and tickets at the rate of eleven for fifty cents and twenty-two for one dollar shall at all times be kept for sale by the conductors on all cars running on any portion of the tracks of this extension, each of which tickets shall be good for one fare on all cars running over the

tracks contained in this grant and extension, or any part of the same; and transfers shall be issued for said tickets as upon receipt of a cash fare or any other ticket of said company; and any passenger, upon the payment of fare upon the line of this extension, shall be entitled to be transferred, at the intersection of Burton street and Clark avenue, to any car operated upon the Clark avenue line of said company, and shall also be entitled to any and all such transfers to any other line or lines of said company, as passengers upon the Clark avenue and Pearl street line of said company are now or may hereafter be entitled to, and any passenger, upon the payment of fare upon the connecting line, shall be entitled to a transfer to this extension.

Sec. 8. Said railroad company, its successors or assigns, shall at all times hereafter save harmless and indemnify the City of Cleveland from any and all lawful claims and damages for injury to person or property and all costs and expenses to which said city may be subjected or made liable, by any proceedings at law or in equity, or otherwise growing out of the construction, use, operation, or maintenance of said railroad, or out of the granting of the privileges in this ordinance granted or by reason of the giving or granting of the authority or privilege hereby granted.

And it is understood and agreed that the City of Cleveland shall not be held liable to said company, its successors or assigns, for any damage resulting from the breakage of any sewer or water pipe or for any delay that may be caused by the construction of any sewer or laying of any water or gas pipe, or electrical conduit of wires, and the necessary repairing of the same, or for any delay or damages that may be caused by fire or otherwise.

All rights vested in the City Council or Board of Control in respect to the grading or improvement of streets, construction of sewers, culverts, gutters, and the laying of electrical conduits, water and gas pipes therein, are in no way to be impaired

or affected by any of the privileges granted to this company, its successors or assigns by virtue of this ordinance.

Sec. 9. And be it further ordained that the following specifications shall be required by the Council in the running of said company's cars thereon:

First—Cars driven in the same direction shall not approach each other within a distance of thirty feet; and the rate of speed of all cars shall be under the direction of the City Council at all times.

Second—The conductors and motormen of all cars shall keep a vigilant watch of all teams, carriages, persons on foot, and especially children on the track or moving toward it; and upon the first appearance of danger to such team or person, or other obstruction the car shall be stopped in the shortest time and space possible.

Third—Cars after sunset shall be provided with signal lights.

Sec. 10—The rights and privileges herein granted shall be subject to the provisions of the general street railway ordinances, or so much of the same as may be applicable and not inconsistent herewith and such further and future ordinances as the Council and Board of Control may prescribe.

Sec. 11—This grant shall be in force until the 13th day of July, A. D. 1913.

Sec. 12—The said company shall, within twenty days after the passage of this ordinance, pay to the city the cost of publishing the same, and shall file with the City Clerk an acceptance in writing of the rights and privileges herein granted and therein agree to comply with and perform all the terms and conditions upon which the same are granted, and as soon after such acceptance as the Board of Control may direct. Said company shall commence the work of constructing said extension and shall complete the same within four months thereafter, otherwise this ordinance shall be null and void.

Sec. 13—The failure or refusal of said company to comply with and perform all and singular the terms and conditions of

this ordinance, or the general ordinances of the city relating to street railroads now or hereafter in force shall, unless otherwise provided, work a forfeiture of this grant, and the rights and privileges hereby granted shall become null and void upon the passage of an ordinance to that effect, or in case said company shall fail to operate cars upon said extension for the period of twenty days after having begun operation this grant, together with all rights hereunder, shall cease and determine.

Sec. 14—This ordinance shall take effect and be in force from and after its passage and legal publication.

Passed April 12, 1897.

ORDINANCE 27124A

ORDINANCE NO. 27124-A—AN ORDINANCE granting to The Cleveland Electric Railway Company the right to extend and operate its double-track street railway on Euclid avenue, from Erie street easterly to a point about one hundred (100) feet west of Perry street.

Section 1—Be it ordained by the City Council of the City of Cleveland, That The Cleveland Electric Railway Company is hereby granted permission to extend and operate its double-track street railway, from its present track at the intersection of Euclid avenue and Erie street, easterly along said Euclid avenue to a point about one hundred (100) feet westerly of the westerly line of Perry street, with the right to construct and maintain the necessary double southerly curve to the southerly line of Euclid avenue, and to its private right of way, extending from the southerly line of Euclid avenue to the northerly line of Prospect street, also the right to cross Euclid alley in a direct line with its said private right of way and also the right to construct and maintain the necessary double curve to connect its said line and private right of way with its present double-track line in Prospect street, with the necessary connecting tracks and also poles and overhead wires, and to construct and maintain said extension and operate the same by means of electricity as a motive power upon the following terms and conditions:

Sec. 2—The laying of such tracks and the erection of such poles and the placing thereon of the necessary wires and appliances shall be under the supervision and control of the Director of Public Works of the City of Cleveland, and such poles shall be of such size and shall be set at such places as shall be required by said directors. Should it become necessary in the prosecution of any work by the city, or by the property owner in front of whose property the poles may be situated that such poles be temporarily moved, such removal shall be made, and such poles shall be reset by said company at its own cost. The running of cars on any part of said extension, may be suspended by the Board of Control for such period as may at any time be necessary on account of repairs to streets or sewers, or the making of any public improvements, and whenever it may be necessary to remove any tracks for any of the purposes aforesaid, the same shall be taken up and relaid at the expense of said company.

Sec. 3—The said company shall at all times use such precaution for the public safety as the City Council may from time to time require, and shall at all times defend, keep harmless and indemnify the City of Cleveland from and against all claims and demands for any injury to persons or property, costs and expense to which the city may be subjected, or made liable by any proceedings at law or in equity, or otherwise, growing out of this grant, or out of the exercise or enjoyment of the same by said company, and said company shall operate the said extension subject to such regulations as to use as are now in force on its lines on Euclid avenue, west of Erie street, and also subject to such general regulations and ordinances as may from time to time be enacted by said City Council, provided that said company shall continue to run on Prospect street as far west as Erie street at least each alternate car of each of its lines and branches now being operated on Prospect street.

Sec. 4—Upon the completion of the road upon said extension, said company shall pay into the City Treasury, to the

credit of such fund or funds as may be designated by the City Council, a sum of money equal to the present value of a strip of paving sixteen feet wide on said Euclid avenue for the entire length of said extension, and across said Euclid alley, and along said curves in Prospect street; said value of said strip of pavement shall be determined by the said Director of Public Works; and if said Euclid avenue or said Euclid alley or said Prospect street shall be re-paved at any time, during the life of this extension, the said Cleveland Electric Railway Company shall pay a sum equal to the cost of paving a strip sixteen feet wide along the entire line of said extension on said Euclid avenue and Prospect street and across said Euclid alley, and said company shall keep in constant order and repair a strip sixteen feet in width along the center of the roadway of said Euclid avenue for the entire length of its said extension and across said Euclid alley and on its curves in said Euclid avenue and Prospect street. And the said street railway company shall keep said strip of sixteen feet width along its line on Euclid avenue and Prospect street and across said Euclid alley free from dirt, refuse and snow at all times, and shall remove from the surface of said Euclid avenue and Prospect street and Euclid alley all surplus snow and dirt that may accumulate upon the sides of said streets, avenues and alley due to the cleaning of the said sixteen feet in width, and the said company shall keep the said Euclid avenue and Prospect street, between the curb lines and the crossing of the said Euclid alley for the whole length of said extension well and thoroughly sprinkled from April 1st to November 1st, of each year, and shall furnish, maintain, and keep lighted without cost to the city, a good and sufficient electric arc light at the intersection of its private right of way with the said Euclid avenue and Prospect street and the said Euclid alley, and shall perform all these requirements during the life of this grant.

Sec. 5—The said company within ten days after the passage of this ordinance shall pay to the city the cost of publi-

cation of the same, and shall file with the city clerk, an acceptance in writing of the rights and privileges herein granted, and shall therein agree to comply with and perform all the terms and conditions upon which the same are granted, and as soon after such acceptance as the Board of Control may direct, said company shall commence the work of constructing said extension, and shall complete the same within four months thereafter, otherwise this ordinance shall be null and void.

Sec. 6—The rights and privileges granted under this ordinance shall terminate when the rights of the said Cleveland Electric Railway Company on Euclid avenue west of Erie street, granted under previous ordinances, shall terminate, after which date this ordinance shall not be in force. The Council reserves to itself the right to grant to any person or persons, company or corporation, a joint use for street railway purposes of the tracks and appliances, trolley wires, poles, electricity, etc., herein granted, upon such terms and conditions as said Council shall deem just and reasonable, in case of the failure of said The Cleveland Electric Railway Company, and said person or persons, company or corporation, to come to an agreement.

Sec. 7—This ordinance shall take effect from and after its passage and legal publication.

Passed, May 14, 1900.

ORDINANCE 30431

ORDINANCE NO. 30431 — AN ORDINANCE granting permission to the Cleveland City Railway Company to extend its tracks from Hough avenue southerly along Ansel avenue for a distance of two hundred and twenty (220) feet, with three curves therefrom to the east side of Ansel avenue.

Whereas, The Cleveland City Railway Company has the consent of the abutting property on Ansel avenue, from Hough avenue to a point 220 feet southerly therefrom, for the

construction of a track in said Ansel avenue between the points aforesaid; now therefore,

Section 1—Be it ordained by the Council of the City of Cleveland, That the Cleveland City Railway Company is hereby granted permission to extend a single track in Ansel avenue about two hundred and twenty (220) feet southerly from Hough avenue and construct three spurs or curves from said single track to the east line of Ansel avenue, with the necessary poles and overhead wires, and to construct and maintain said extension, operate the same by means of electricity as a motive power on the following terms and conditions:

Sec. 2—That the laying of such tracks and the erection of such poles, and the placing thereon of the necessary wires and appliances shall be under the supervision and control of the Director of Public Works, and such poles shall be of such size and shall be set at such places as shall be required by said director. Should it become necessary in the prosecution of any work by the city such poles and tracks be temporarily moved, such removal shall be made, and such poles shall be reset by said company at its own cost. The running of cars on any part of the lines, of street railroads of said company may be suspended by the Board of Control for such a period as may at any time be necessary on account of building or repair of said street, or sewer, or the making of any public improvements and said company shall curb and pave with paving brick the entire roadway of Ansel avenue, from Hough avenue to two hundred and twenty (220) feet southerly, including the tracks and the space between same, and keep in repair at its own expense to the satisfaction of the Director of Public Works, the said pavement in the tracks and one foot outside of each rail, including the space between the tracks, and whenever it may be necessary to have any track taken up for any of the purposes aforesaid, the same shall be taken up and relaid at the expense of said company.

Sec. 3—This grant shall be in force until the 26th day of January, 1910, but the Council reserves the right and shall at all times have the right to authorize any other individual company or corporation to jointly occupy and use for street railway purposes the whole or any part of the track and appliances, wires and poles, herein authorized to be constructed on said extension, on such terms and conditions as the Council may deem just and reasonable, unless such individual, company or corporation, shall otherwise agree with the said Cleveland City Railway Company as to terms and conditions of such use and occupation.

Sec. 4—That the said company within ten (10) days after the passage of this ordinance shall pay to the city the cost of publishing the same, and shall file with the City Clerk, an acceptance in writing, of the rights and privileges herein granted and therein agree to comply with and perform all the terms and conditions upon which the same are granted, and as soon after said acceptance as the Board of Control may direct, said company shall commence the work of constructing said extension, and shall complete the same within sixty (60) days thereafter, otherwise this ordinance shall be null and void.

Sec. 5—The failure or refusal of said company at any time to comply with and perform all and singular the terms and conditions of this ordinance or the general ordinances of the City relating to street railroads, now or hereafter in force, shall work the forfeiture of this grant, and the rights and privileges hereby granted shall become null and void, upon the adoption of a resolution by the Council to that effect. Nothing in this ordinance contained, shall be held to release said company from any of the conditions or any of the grants heretofore made by the city.

Sec. 6—That this ordinance shall take effect and be in force from and after its passage and legal publication.

Passed, November 12, 1900.

ORDINANCE 29868

ORDINANCE NO. 29868—AN ORDINANCE granting to the Cleveland Electric Railway Company the right to extend, maintain and operate its present street railway system by a single track street railway extension on Fremont street, between Tod street and Skinner avenue, and on Skinner avenue, between Fremont street and Fleet street, in said city.

Section 1—Be it ordained by the City Council of the City of Cleveland, that The Cleveland Electric Railway Company is hereby granted permission to extend, maintain and operate its present street railway system by a single track street railway extension from its present tracks at the intersection of Tod and Fremont streets, westerly along said Fremont street to the intersection of said Fremont street and Skinner avenue; thence northerly along said Skinner avenue to the intersection of Skinner avenue and Fleet street, connecting with said company's tracks at the junction of said Fleet street and said Skinner avenue; together with all the necessary wires, poles and appliances, and to construct and maintain said extension and operate the same by means of electricity as a motive power, upon the following terms and conditions:

Sec. 2—The laying of such tracks and the erection of such poles and the placing thereon of the necessary wires and appliances shall be under the supervision and control of the Director of Public Works of the City of Cleveland, and such poles shall be of such size and shall be set at such places as shall be required by said Director. Should it become necessary in the prosecution of any work by the city or by the property owner in front of whose property the poles may be situated, that such poles be temporarily moved, or moved to new location, such removal shall be made, and such poles shall be reset by said company at its own cost. The running of cars on any part of said extension may be suspended by the Board of Control for such period as may at any time be necessary on account of repairs to streets or sewers, or the making of any public inprovements, and whenever it may be necessary to re-

move any tracks for any of the purposes aforesaid, the same shall be taken up and relaid at the expense of said company.

Sec. 3—The said company shall at all times use such precaution for the public safety as the City Council may from time to time require, and shall at all times defend, keep harmless and indemnify the City of Cleveland from and against all claims and demands for any injury to persons or property, cost and expense to which the city may be subjected, or made liable by any proceeding at law or in equity, or otherwise, growing out of this grant, or out of the exercise or enjoyment of the same by said company, and said company shall operate the said extension subject to such regulations as to use as are now in force or may hereafter be in force in respect to the line of street railway to which this is an extension, and subject to all such general regulations and ordinances as may from time to time be enacted by the City Council.

Sec. 4—If at any time said Fremont street or said Skinner avenue shall be paved or repaired during the life of this extension, the said The Cleveland Electric Railway Company shall pay to the City of Cleveland a sum equal to the cost of paving a strip eight feet wide along the entire length of said extension on said streets, with such material and in such manner as the said city may direct, and the said street railway company shall keep said strip eight feet in width along said extension on said street at all times free from dirt, refuse and snow, and maintain and keep the same in repair at such times and in such manner as the city may direct.

Sec. 5—The said The Cleveland Electric Railway Company, in consideration of the rights and privileges herein granted, shall remove one of its tracks on Fleet street, between Skinner avenue and Tod street, and on Tod street between Fleet street and Fremont street, place the remaining track in the middle of the streets, and pave same, as provided for in Section 4, and shall hereafter operate a single track street railway, and shall not operate a double track street railway on said Fleet street, from Skinner avenue to Tod street, and on said Tod

street between said Fleet street and Fremont street, during the term of this ordinance.

Sec. 6—The said The Cleveland Electric Railway Company shall, within ten days after the passage of this ordinance, pay to the city the cost of publication of the same, and shall file with the City Clerk an acceptance in writing, of the rights and privileges herein granted, and shall therein agree to comply with and perform all the terms and conditions upon which the same are granted, and as soon after the acceptance as the Board of Control may direct, said company shall commence the work of constructing said extension, and shall complete the same within sixty days thereafter, otherwise this ordinance shall be null and void.

Sec. 7—The rights herein granted shall terminate with the termination of the rights of said The Cleveland Electric Railway Company to operate the lines of street railway to which this ordinance provides an extension.

Sec. 8—All ordinances or parts of ordinances or grants heretofore made to the said The Cleveland Electric Railway Company, insofar as they are inconsistent with the terms of this ordinance, are hereby repealed.

Sec. 9—This ordinance shall take effect and be in force from and after its passage and legal publication.

Passed March 25, 1901.

ORDINANCE 29085A.

ORDINANCE NO. 29085A.—AN ORDINANCE to authorize the Cleveland City Railway Company to extend its lines of street railway by a double track, from the intersection of Woodland avenue and Woodland Hills avenue southerly in Woodland Hills avenue to the intersection of Woodland Hills avenue and Kinsman street.

Section 1—Be it ordained by the Council of the City of Cleveland, That The Cleveland City Railway be and it is hereby granted the right to extend its double-track street railway from its tracks at the intersection of Woodland avenue

and Woodland Hills avenue southerly in and along Woodland Hills avenue to Kinsman street, and to connect with its tracks at the intersection of Woodland Hills avenue and Kinsman street, together with the right to it, its successors and assigns, to construct, maintain and operate by electricity the said extension; together with all necessary poles, wires, sidetracks, turnouts, switches, Y-tracks and other equipments and appliances which may be necessary to properly construct, maintain and operate such extension as a double-track electric railway, in connection with its lines now existing in Woodland avenue and Kinsman street.

Sec. 2—The laying of such tracks and the erection of such poles and the placing thereon of the necessary wires and appliances, shall be under the supervision and control of the Director of Public Works, and such poles shall be of such sizes and shall be set in such places and in such manner as shall be required by said Director. Should it become necessary in the prosecution of any public work of said city, that such poles should be temporarily moved, such removal shall be made and such poles reset by said company at its own cost and expense; the running of cars upon any portion of the said extension may be suspended by the Director of Public Works, and the tracks ordered removed for the purpose of constructing or repairing pavements, sewers or drains, or other work upon the said streets, and such removal and the replacing of the said tracks and the returning of the streets to their original condition shall be done by said company at its own cost and expense.

Sec. 3—The said company shall at all times use such precautions for the public safety as the Board of Control may from time to time require, and shall at all times defend, keep harmless and indemnify the City of Cleveland from and against all lawful claims and demands for any injury to persons and property, costs and expenses to which the city may be subjected or made liable by any proceedings at law, in

equity, or otherwise growing out of this grant, or out of the exercise and enjoyment of the same by said company.

Sec. 4—Whenever the said city shall cause the said Woodland Hills avenue, between Woodland avenue and Kinsman street, to be paved, the said company shall pave or pay the cost of paving, as the Council may elect, the entire space between the outer rails of both tracks, including the space between the two tracks, and a strip one foot in width outside the outer rail of each track, with such kind and quality of paving as the Board of Control shall determine, and at least as good as the balance of the paving on said street, and until such time of paving said street by said city, the said company shall pave said above mentioned portion of said street with such kind of pavement as the Board of Control shall direct. The said company shall at all times keep such pavement in good condition satisfactory to the Director of Public Works.

Sec. 5—That the city reserves the right to grant the joint use of all or any portion of the tracks laid or used in said extension to any company or companies that may be hereafter organized, upon such terms as to compensation as may be mutually agreed upon between company or companies and the said The Cleveland City Railway Company, its successors and assigns, or as the said City Council shall deem to be just and equitable in the event of said companies failing to agree.

Sec. 6—This grant is made subject to the conditions and requirements of the grant of the said The Cleveland City Railway Company of the right to construct and operate its street railway lines in Woodland avenue, and this grant, and all the rights and privileges herein granted, shall terminate at the same date as the rights and privileges granted to said company. for its lines in Woodland avenue aforesaid.

Sec. 7—This ordinance shall be in force and effect from and after its passage and legal publication, and the payment of the cost and expense of said publication, and the acceptance in writing of this ordinance by said company.

Passed April 2, 1901. D. B. STEUER,
President of the Council.
HOWARD H. BURGESS, City Clerk.
Approved by the Mayor April 2, 1901.

ORDINANCE 29086 A

ORDINANCE NO. 29086A.—AN ORDINANCE to authorize the Cleveland City Railway Company to extend its line of street railway by a double track from the intersection of Detroit street and Lake avenue northwesterly in and along Lake avenue to, through and under the railroad of the Lake Shore & Michigan Southern Railway Company, to a point in said Lake avenue 400 feet westerly from the westerly line of the right of way of the said L. S. & M. S. Railway Company.

Sec. 1—Be it ordained by the Council of the City of Cleveland, That The Cleveland City Railway Company be and it is hereby granted the right to extend its double track street railway from its present traks at the intersection of Detroit street and Lake avenue northwesterly in and along Lake to, through and under the railroad of the Lake Shore & Michigan Southern Railway Company to a point in said Lake avenue 400 feet westerly from the westerly line of the right of way of said The Lake Shore & Michigan Southern Railway Company, measured along the center of the said Lake avenue, thence by a double track curve southerly to the southerly line of the said Lake avenue, together with the right to it, its successors and assigns, to construct, maintain and operate by electricity the said extension, together with all necessary poles, wires, side tracks, turn-outs, switches, Y tracks and other equipments and appliances which may be necessary to properly construct, maintain and operate such extension as a double track street railway, in connection with its existing line in Detroit street.

Sec. 2—The laying of such tracks and the erection of such poles and the placing thereon of the necessary wires and appliances, shall be under the direction and control of the Director of Public Works, and such poles shall be of such sizes and shall be set in such places and such manner as shall be required by said Director. Should it become necessary in the prosecution of any public work of said city, that such poles should be temporarily moved, or that such tracks should be taken up, or that

the running of cars should be suspended, then upon the order of the said Director of Public Works, the said company will remove said poles or tracks, or suspend the running of cars, and at the completion of the said public work shall replace the said poles and tracks, and return the street to its original condition without cost to the city, and to the entire satisfaction of the said Director of Public Works.

Sec. 3—The said company shall at all times use such precautions for the public safety as the Board of Control may from time to time require, and shall at all times defend, keep harmless and indemnify the City of Cleveland from and against all lawful claims and demands for any injury to persons and property, costs and expenses to which the city may be subjected or made liable by any proceedings of law or in equity, or otherwise growing out of this grant, or out of the exercise and enjoyment of the same by said company.

Sec. 4—Whenever the said city shall cause the said Lake avenue, between Detroit street and the point of termination of the above granted extension, to be paved, the said company shall pave or pay the cost of paving, as the Council may elect, the entire space between the outer rails of both tracks, including the space between the tracks, and a strip one foot in width outside the outer rail of each track, with such material and in such manner as the Board of Control may determine, and of at least as good quality as the balance of the street, and until such time of paving such street by said city, the said company shall pave said above mentioned portion of said street with such pavement as the Board of Control shall direct. The said company shall at all times keep said pavement in good condition satisfactory to the Director of Public Works.

Sec. 5—This grant is made subject to the conditions and requirements of the grant to the said The Cleveland City Railway Company of the right to construct and operate its street railway lines in Detroit street, and this right, and all the rights and privileges herein granted shall terminate at the same date

as the rights and privileges granted to said company for its lines in Detroit street aforesaid.

Sec. 6—This ordinance shall be in force and effect and after its passage and legal publication, and the payment of the cost and expense of said publication, and the acceptance in writing of this ordinance by said company.

Passed April 2, 1901.

ORDINANCE 31902.

ORDINANCE NO. 31902A.—AN ORDINANCE to extend the tracks of the Cleveland Electric Railway Company on Bank street.

Section 1. Be it ordained by the Council of the City of Cleveland, That the Cleveland Electric Railway Company is hereby authorized and empowered to extend its double track railroad in Bank street from the intersection of Lake street and Bank street, northerly along said Bank street to the property of the Union Depot Company, lying west and south of Bank street and extending through to Water street, to connect with the tracks of the Cleveland City Railway Company in Water street, and place thereon the necessary tracks, curves, connections, poles and overhead wires to connect such extension with the tracks now in Bank street and Water street by passing over said Depot Company's land, and to enable it to operate its cars over such extension by electricity or other motive power as may be directed by the city council of the City of Cleveland.

Sec. 2—The laying of such tracks and the erection of such poles and wires and the operation of cars thereon shall in all respects be in accordance with the terms and conditions contained in an ordinance passed on July 16th, 1886, by which the right to construct tracks and operate a street railway in Bank street from Superior street to Lake street was granted, and all rights herein granted shall terminate on March 22, 1905, or such earlier time as the said company may for any reason abandon the use of the tracks along the private right-of-way between Bank street and Water street.

Sec. 3—The city reserves to itself and also reserves the right to grant to any other individual, company or corporation the right to jointly occupy and use for street railway purposes the whole or any part of the tracks and appliances wires and poles, herein authorized to be constructed in said extension, including at least two tracks with all the appliances on the private right-of-way lying between Bank street and Water street, upon such terms and conditions as the council may deem just and reasonable, unless such individual, company or corporation shall otherwise agree with The Cleveland Electric Railway Company as to the terms and conditions of such use and occupation.

Sec. 4—The said company within ten days after the passage of this ordinance shall pay to the city the cost of publishing the same, and shall file with the City Clerk an acceptance in writing of the rights and privileges herein granted, and therein agree to comply with and perform all the terms and conditions upon which the same are granted, and as soon after such acceptance as the Board of Control may direct, said company shall commence the work of constructing said extension and shall complete the same within four months thereafter, otherwise this ordinance shall be null and void.

Sec. 5—This ordinance shall take effect and be in force from and after its passage and legal publication.

Passed June 24, 1901.

ORDINANCE 32402.

ORDINANCE NO. 32402A—AN ORDINANCE granting the Cleveland Electric Railway the right to etexnd and operate its double track street railroad, from Seneca street through Michigan street to Ontario street.

Sec. 1—Be it ordained by the Council of the City of Cleveland, That the Cleveland Electric Railway Co. is hereby authorized to extend the tracks of the double track street railway of its Seneca street and Scranton avenue line from the intersection of Seneca street and Michigan street to Ontario street, together with the necessary tracks and curves to connect said ex-

tension with the tracks now existing in the streets named, and the necessary poles and wires, and to operate its street railway over such extension by means of electricity or other motive power that may be approved by the Council.

Sec. 2—Said company shall construct the said tracks and appliances in such manner as the Board of Control may direct, under the supervision of the City Engineer and to his satisfaction.

Sec. 3—This grant is made subject to all ordinances of the City of Cleveland, now in force, or which may hereafter be in force, providing for the construction, operation and government of street railways, except that the said street railway company shall be relieved from the provisions of Sec. 871 of the Revised Ordinances, relating to paying the estimated value of certain paving.

Sec. 4—This grant shall expire March 22nd, 1905, unless it be sooner terminated by the City, and the City reserves to itself the right to terminate it at any time, and shall at all times reserve the right to itself, and also the right to authorize any other individual, company or corporation to jointly occupy and use, for street railway purposes, the whole or any part of the tracks and appliances, wires and poles herein authorized to be constructed on said extension. and on Seneca street, between the south line of Michigan street and the center line of Superior street, upon such terms and conditions as the City may deem just and reasonable, unless such individual, company or corporation shall otherwise agree with said the Cleveland Electric Railway Company as to the terms and conditions of such use and occupation.

Sec. 5—Said company shall remove its turn table in Seneca street, leaving said street, in good condition, and shall extend its tracks in said Seneca street northerly connecting the same with two of the tracks in Superior street, the same to be done under the supervision and to the satisfaction of the City Engineer.

Sec. 6—Said company shall within ten days after the passage of this ordinance pay to the City the cost of publishing the same, and file with the City Clerk an acceptance in writing of the rights and privileges herein granted, and this grant shall become void if said company shall fail to exercise the privileges herein granted within four months from the passage hereof; and this grant shall also become void if said company shall fail on or before the 1st day of October, 1901, to repave with Medina block stone pavement the strip sixteen feet in width on and along its Cedar avenue line wherever on Cedar avenue or Perry street cobble stone pavement now exists.

This ordinance shall take effect and be in force from and after its passage and legal publication and the acceptance of the terms thereof by said Company.

Passed July 1, 1901.

ORDINANCE 33573.

ORDINANCE No. 33573.—AN ORDINANCE—To grant the Cleveland Electric Railway Company the right to extend and operate a single track street railroad from Euclid avenue along the easterly line of the Public square to Superior street and the right to use the tracks of the Cleveland City Railway from the westerly side of the Public square to Erie street.

Section 1. Be it ordained by the Council of the City of Cleveland, That the Cleveland Electric Railway Company be and is hereby granted permission to construct the following extension of its existing double track street railroad, to-wit:

Beginning at the intersection of Euclid avenue with the easterly side of the Public square, thence northerly by single track along the easterly side of the Public square to Superior street and to connect with the existing tracks in Superior street at that point, together with the necessary curves and connecting tracks, poles and wires, and the said The Cleveland Electric Railway Company is hereby authorized to use the tracks of the Cleveland City Railway Company now ex-

isting in Superior street in the Public square and in Superior street from the Public square to the intersection of Superior street with Erie street, and to connect the tracks of the said The Cleveland Electric Railway Company on Erie street with the extsting tracks on Superior street at the intersection of said Erie street and Superior street, together with the necessary curves, connecting tracks, poles and wires, and to operate its street railway over such extension by means of electricity or other motive power that may be approved by the council.

Sec. 2. Said company shall use such rail and shall construct the said tracks and appliances in such manner as the Board of Control may direct, under the supervision of the city Engineer and to his satisfaction.

Sec. 3. This grant is made subject to all ordinances of the City of Cleveland now in force, or which may hereafter be in force, providing for the construction, operation and government of street railways, the said company, however, to pay for seventeen (17) feet of paving if it be allowed to lay its tracks five (5) feet apart, except that the said street railway company shall be relieved from the provisions of Sec. 871 of the Revised Ordinances, related to paying the estimated value of certain paving.

Sec. 4. This grant shall expire on March 22, 1905, unless it be sooner terminated by the City, and the City reserves to itself the right to terminate it at any time, and shall at all times reserve the right to itself, and also the right to authorize any other individual, company or corporation to jointnly occupy and use, for street railway purposes, the whole or any part of the tracks and appliances, wires and poles herein authorized to be constructed on said extension, upon such terms and conditions as the City may deem just and reasonable, unless such individual, company or corporation shall otherwise agree with the said The Cleveland Electric Railway Company as to the terms and conditions of such use and occupation.

Sec. 5. Said Company shall within ten days after the passage of this ordinance pay to the City the cost of publishing the same, and file with the City Clerk an acceptance in writing of the rights and privileges herein granted and therein agree to comply with and perform all the terms and conditions upon which the same are granted, and, as soon after such acceptance as the Board of Control may direct, said company shall commence the work of constructing said extension, and shall complete the same within four months thereafter; otherwise this ordinance shall be null and void.

Sec. 6. This ordinance shall take effect and be in force from and after its passage and legal publication.

Passed Aug. 5, 1901.

ORDINANCE 33136—A.

ORDINANCE NO. 33136A.—AN ORDINANCE to permit the Cleveland Electric Railway Company to Construct a single track extension of its street railway in Bolivar street and Eagle street, connecting the same with existing tracks in Erie street and with tracks on private property between said Bolivar and Erie street.

Section 1. Be it ordained by the Council of the City of Cleveland. That the Cleveland Electric Railway Company be and it hereby is authorized to extend and operate a single track street railway in Bolivar street and Eagle street, connecting the same with its existing tracks in Erie street by single track Y's, thence running westerly on said street and entering certain private property by a single track a single curve on each of said streets at points respectively distant not more than two hundred and fifty feet west of the west line of said Erie street and to operate said extension in connection with the tracks now existing and such tracks as may be constructed on said private property, by means of electricity or such other motive power as may hereafter be approved by the Council.

Sec. 2. Said company shall construct the said tracks and appliances in such manner as the Board of Control may direct,

under the supervision of the City Engineer and to his satisfaction.

Sec. 3. This grant is made subject to all ordinances of the City of Cleveland, now in force, or which may hereafter be in force, providing for the construction, operation and government of street railways, except that the said street railway company shall be relieved from the provisions of Sec. 871 of the Revised Ordinances, relating to paying the estimated value of certain paving.

Sec. 4. This grant shall expire March 22, 1905, unless it be sooner terminated by the City, and the City reserves to itself the right to terminate it at any time, and shall at all times reserve the right to itself, and also the right to authorize any other individual company or corporation to jointly occupy and use for street railway purposes, the whole or any part of the tracks and appliances, wires and poles herein authorized to be constructed on said extension, upon such terms and conditions as the City may deem just and reasonable, unless such individual, company or corporation shall otherwise agree with said The Cleveland Electric Railway Company, as to the terms and conditions of such use and occupation.

Sec. 5. The said company shall within ten days after the passage of this ordinance pay to the City Clerk the cost of publishing the same, and shall file with the City Clerk an acceptance in writing of the rights and privileges herein granted and therein agree to comply with and perform all the terms and conditions upon which the same are granted, and as soon after such acceptance as the Board of Control may direct, said company shall commence the work of constructing said extension, and shall complete the same within six months after the passage of this ordinance; otherwise this ordinance shall be null and void.

Sec. 6. This ordinance shall take effect and be in force from and after its passage and legal publication.

Passed Jan. 13, 1902.

ORDINANCE 38167.

ORDINANCE NO. 38167—AN ORDINANCE to grant to The Cleveland Electric Railway Company the right to extend and operate its double track street railroad on Erie street, from Euclid avenue to St. Clair street, and from Scovill avenue to Woodland avenue.

Section 1. Be it ordained by the Council of the City of Cleveland Electric Railway Company, its successors and assigns are hereby authorized to extend and operate said company's double track street railroad in and along Erie street, from Euclid avenue to St. Clair street, and from Scovill avenue to Woodland avenue, together with all tracks and curves necessary to connect said extensions with the present tracks of said company in Euclid avenue and Scovill avenue, and with the tracks of The Cleveland City Railway Company in Woodland avenue and Superior street, and all necessary poles and wires, and to operate cars over such extensions by means of electricity, or other motive power that may be approved by the council; provided that they must use the existing tracks of The Cleveland City Railway Company between Superior street and St. Clair street, upon terms to be fixed by the Council, if said companies are unable to agree upon terms.

Sec. 2. Said company shall construct the said tracks and appliances in such manner as the Board of Control may direct, under the supervision of the City Engineer, and to his satisfaction.

Sec. 3. This grant is made subject to all ordinances of the City of Cleveland, now in force or which may hereafter be in force, providing for the construction, operation and government of street railroads, except that said company shall be relieved from the provisions of Section 871 of the Revised Ordinances, relating to paying the estimated value of certain paving.

Sec. 4. This grant shall expire March 22, 1905, and the City reserves the right to itself, and also the right to author-

ize any other individual, company or corporation to jointly occupy or use the whole or any part of the tracks and appliances, poles, wires, and current herein authorized to be constructed upon said extensions upon such terms and conditions as the City may deem just and reasonable, unless such individual, company or corporation shall otherwise agree with the said The Cleveland Electric Railway Company as to the terms and conditions of such use and occupation.

Sec. 5. Said Company shall, within ten days after the passage of this ordinance, pay to the City the cost of publishing the same, and file with the City Clerk an acceptance in writing of the rights and privileges herein granted, and this grant shall become void if said company shall fail to exercise the privileges herein granted within six months from the passage of this ordinance.

Sec. 6. This ordinance shall take effect and be in force from and fater its passage and legal publication, and the acceptance of the terms thereof by said company.

Passed June 23, 1902.

RECORD IN STATE VS. EAST CLEVELAND RAILROAD CO.

On the 28th of January, 1888, there was filled in the Circuit Court of Cuyahoga County, State of Ohio, a quo warranto petition, and afterwards, to-wit, on the 23rd of April,

1888, an amended petition was filed in said cause, which is in words and figures following:

"IN THE CIRCUIT COURT

"State of Ohio
Cuyahoga County

AMENDED PETITION
IN QUO WARRANTO
THE STATE OF OHIO,
on the relation of
Alexander Hadden, Prosecuting Attorney of
Cuyahoga Co., Ohio,
Plaintiff,

vs.

THE EAST CLEVELAND RAILROAD COMPANY,
Defendant.

Now comes Alexander Hadden, by leave of court, and for his amended petition says that he is the duly elected, qualified and acting prosecuting attorney of Cuyahoga County, State of Ohio. He says that the East Cleveland Railroad Company, defendant, is a corporation duly organized under the laws of the State of Ohio. That the City of Cleveland is a city of the second class, of a first grade in said State, and that Garden street is a public street in said city. The East Cleveland Railroad Company claims, holds, and exercises the privilege, franchise and right of maintaining and operating a street railway in and upon said Garden street, being Brownell street in the west and Willson avenue on the east, for the transportation of passengers for hire, in contravention of law. By an ordinance of said city, which was passed and took effect on the 14th day of January, A. D., 1868, said franchise, privilege and right was granted to the defendant for the term of twenty years from said date, and

no longer. Immediately upon the passage of said ordinance the defendant accepted said grant.

On the 22d day of March, A. D. 1880, the council of said city passed an ordinance in the following words:

> "AN ORDINANCE to permit the East Cleveland Railroad Company to extend the Garden street branch of its railway.
>
> "Section 1. Be it ordained by the City Council of the city of Cleveland that the East Cleveland Railroad Company be and it is hereby authorized and empowered to extend the Garden street branch of its railway from the present track at the intersection of Baden avenue and Quincy street in an easterly direction on and along said Quincy street to the intersection of Lincoln avenue, and to equip and operate the said extension and its Garden street branch for the period of twenty-five years from and after the passage of this ordinance; but with the express condition that no increase of fare shall be charged by said company on any part of its said branch, or of its main line, or of said extension. This grant is made subject to all ordinances of said City Council now in force or which may hereafter be duly passed regulating street railroads.
>
> "Sec. 2. This ordinance shall take effect and be in force from and after the date of its passage and legal publication."

Subsequently to January 14, 1868, said defendant was by said city permitted to and did extend its railroad from said Willson avenue eastwardly to said intersection of Baden avenue and Quincy street, but no part of either of said extensions are between Brownell street on the west and said Willson avenue on the east, but are both wholly easterly from said Willson avenue.

Prior to the passage of said ordinance of March 22, 1880, none of the owners of lots abounding and abutting on Garden

street, between Brownell street on west and Willson avenue on the east, have consent to any renewal of the grant for a street railway on the said part of said street which is a distance along said Garden street of nearly two miles, nor was any public notice of any application therefor given by the clerk of said city.

He further says that he is informed and believes and so avers the fact to be that defendant claims the right to have and exercise the right, franchise and privilege aforesaid, under and by virtue or said ordinance of March 22, 1880, as being a renewal of the grant in said ordinance of January 14, 1868, and by virtue of no other grant, permission, or authority whatever.

WHEREFORE relator prays the advice and judgement of the court, that the defendant, the East Cleveland Railroad Company, be required to come before the court and answer unto the State of Ohio by what warrant it claims, holds and exercises the privilege, franchise and right aforesaid, and that it be decreed and adjudged that the Eact Cleveland Railroad Company unlawfully claims, holds and exercises the privilege, franchise and right aforesaid, and that it be wholly ousted and excluded therefrom, and that the relator recover his costs.

ALEANDER HADDEN,
Prosecuting Att'y of Cuyahoga Co., Ohio.

THE STATE OF OHIO
Cuyahoga County.

Alexander Hadden, being first duly sworn, says that he is the relator in the above entitled action, and that the facts set forth in the foregoing amended petition are true as he verily believes.

Sworn to before me and subscribed in my presence by the said Alexander Hadden this 23rd day of April, 1888.

M. S. HINMAN,
Deputy Clerk."

That afterward on the 9th of January, 1889, the following judgment was rendered in said cause:

"January 9, 1889. To court: The demurrer to the amended petition being sustained, and the relator not desiring to amend or plead any further, now therefore it is considered and adjudged that said defendant go hence without day and recover of said relator its costs herein. Relator excepts to the rendering of said judgment. Jour. 2-38."

The opinion of the court in said case is that reported in 6 C. C. Rep. p. 318 under the title "Ex rel Hadden v. The East Cleveland Railroad Co." and this judgment was afterwards affirmed without report by the Supreme Court of Ohio. See 27 W. L. B. 171.